

# Digital markets competition regime guidance

Amazon's response to CMA194con

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## Introduction and executive summary

1. Amazon welcomes the opportunity to provide comments on the Competition and Markets Authority's (CMA's) draft guidance in relation to the "Digital markets competition regime" (DMCC regime) and "Mergers Reporting Guidance" (the draft Mergers Guidance) published by the CMA on 24 May 2024 (together the Draft Guidance, with the anticipated final version of the same referred to throughout this response as the Guidance).
2. In this executive summary, we provide our key overarching comments on the Draft Guidance. More detailed responses on each section of the Draft Guidance (in accordance with the questions set out in the Consultation Document) follow in the sections below.

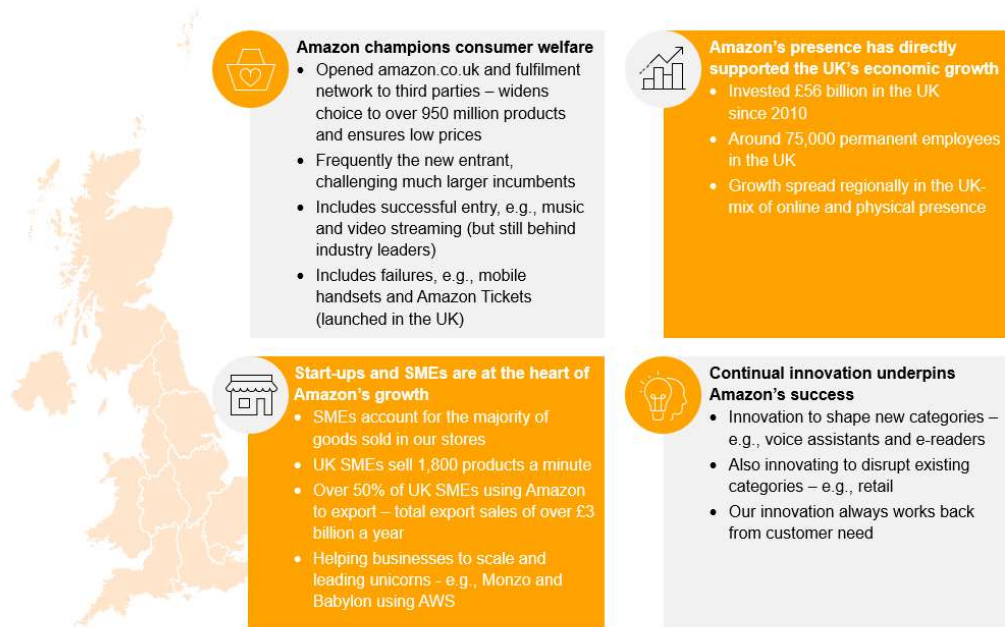
### **Introduction and context to comments on Draft Guidance**

3. The Digital Markets, Competition and Consumers Act (DMCC Act) represents one of the most radical changes to UK competition regulation in the last thirty years and, in many respects, sets out a markedly different approach to that adopted in other national and international competition regimes. In particular, the DMCC Act affords the CMA with extensive powers to impose bespoke conduct requirements (CRs) on SMS firms or make pro-competitive interventions (PCIs), as well as unprecedented powers to require firms to vary their usual conduct and/or perform tests or demonstrations which will directly impact their customers. The CMA's interventions will, therefore, inevitably affect the commercial decisions, economic incentives and conduct of SMS firms, and the businesses that rely on their services. Given the increasing importance of digital activities to innovation, investment and growth this, in turn, is likely to have far-reaching consequences for competitors, end-consumers and the wider UK (and global) economy.
4. Implemented effectively, the DMCC regime could be a source of competitive advantage for the UK. It provides a unique opportunity for the CMA to ensure that it tailors its regulatory approach to the specific circumstances here in the UK, and operates the regulatory model set out in the DMCC Act in a manner designed to support growth, investment and innovation in the UK. Proportionate regulation is a source of economic advantage, and the UK has an opportunity to take a more innovation-friendly approach than regulators in other jurisdictions, who have attracted criticism for imposing measures that go beyond the scope of the potential concerns that they were initially designed to address.
5. By contrast, uncertainty or ambiguity in legal requirements, particularly when those requirements are as far-reaching as those in the DMCC Act, carries a real and acute risk of chilling investment and innovation in the UK to the detriment of all stakeholders, whether large or small.
6. Against this backdrop, it is open to the CMA to implement the DMCC in a manner consistent with the UK's position as a global leader in the design of evidence-based, independent regulation that is predictable and fair. In order to achieve this, the DMCC must be underpinned by clear guidance which allows all parties to understand the purpose of the regime, how it will be operated and the outcomes it is seeking to achieve. This is particularly relevant in a new, far-reaching regime like the DMCC, which affords significant discretion to the regulator and where, as above, the consequences of failing to ensure sufficient legal certainty and predictability for all parties are especially severe. If anything, the novelty of the DMCC regime, coupled with its departure from other competition regimes, enhances the need for clarity and certainty to ensure that obligations are fully understood by all parties. Greater clarity would reduce the risk that unnecessary time and resources are spent clarifying procedural or substantive issues and / or enforcing requirements that could have been clear from the outset. Moreover, guidance issued in the context of other regulatory regimes establishes that it is feasible for the Guidance to provide an analytical framework setting out how the CMA will undertake its substantive assessment.
7. Accordingly, the Guidance must deliver on the core objectives of transparency, predictability and consistency in terms of both substance and procedure and should reflect the CMA's stated intent to "adopt

a participative approach” and take “a targeted, evidence-based and proportionate approach to implementing” the new DMCC regime.<sup>1</sup>

8. For the benefit of all parties and the UK economy as a whole, it is imperative that the CMA enforces regulation in a manner that 1) prioritises consumer welfare, ensuring all consumers benefit from choice, low prices and excellent service; 2) fuels the economic recovery, unlocking long-term growth, investment and job creation; 3) ensures the UK provides a fertile environment for the growth of start-ups and SMEs; and 4) allows innovation to thrive everywhere in the UK. Indeed, those are the same outcomes Amazon has been delivering since we first entered the UK over 20 years ago:

Figure 1: Amazon is supporting a long-term vision for the UK economy



9. Amazon’s incentive, therefore, is to ensure the UK remains open to the competition and innovation that we, and numerous other businesses, large and small, provide and depend on.

**Overarching comments on the Draft Guidance**

10. We recognise that the Draft Guidance is a first draft. However, in our view, the current draft requires significant amendment to align with the principles discussed above. We therefore welcome this opportunity to provide comments and suggested amendments for the CMA’s consideration on how these outcomes can be achieved.
11. The Draft Guidance largely restates much of the language in the DMCC Act itself, with little explanation of how the CMA intends to interpret and apply the legislation in practice. Given that the DMCC Act affords the CMA a significant amount of discretion in applying the various powers within the Act, the Draft Guidance should be expanded to provide further clarity on how it is intended that this discretion will be applied. Indeed, this is the very purpose of the Guidance, to go beyond the legislative text and provide clear and transparent guidance on the CMA’s approach. For the avoidance of doubt, this would not introduce any quasi-legislative tests into the Guidance. Rather, it will ensure the Guidance provides a clear, transparent and workable framework for all parties to understand the CMA’s intentions and proposed practice in implementing and applying the DMCC regime.
12. Against this backdrop, our key overarching comments on the Draft Guidance (explained in more detail in the following sections) are as follows:

<sup>1</sup> See questions 3 and 4 of <https://www.gov.uk/government/speeches/the-cmas-approach-to-digital-markets-regulation>

1. **The Draft Guidance does not provide a clear framework for the CMA's analyses. While it is true that the DMCC regime is novel, this makes it even more important for the CMA to draw on its wealth of experience and learnings from operating other competition regimes, as well as the experience of other *ex-ante* regulators, such as Ofcom and the FCA. There is no justification for the wholesale departure from the CMA's / other regulators' approach to guidance underpinning those regimes in the Draft Guidance.**
  - The Draft Guidance largely rejects, either explicitly or implicitly, the wealth of experience which the CMA, and other regulators, have built up over years of enforcement, and the approach and level of detail in the Draft Guidance marks a departure from that in other regimes operated by the CMA (e.g., mergers and market studies). While it is of course the case that a novel regime will require some new approaches, and a degree of flexibility to adapt if certain processes prove ineffective in this context, it is inefficient and counter-productive to dismiss these learnings altogether. Indeed, previous Guidance, case law, decisional practices and analytical techniques (such as market definition) provide a solid foundation to build from, and amend as appropriate, to ensure effective implementation and drive positive outcomes for all stakeholders. Drawing on well-established learnings and techniques from other regimes where appropriate also helps to ensure regulatory consistency for firms affected by such regimes globally, and ensure they are not tasked with navigating a myriad of conflicting and inconsistent regulatory obligations.
  - Therefore, while we would not expect the Guidance to set out a rigid process which would prevent the CMA from making case-by-case assessments, it should provide some clarity on key issues and processes, including the relevance (or lack of) of well-established analytical tools, e.g., in relation to economic assessment of market power and adverse effects. This would provide a clear framework for the DMCC regime which can be tested and refined as required, as the CMA builds further experience.
2. **The Draft Guidance does not include a clear and detailed procedural framework for each key stage of the DMCC regime (e.g., SMS designation, or the imposition of CRs/PCIs). In particular, there is a lack of proposed timelines / milestones to allow all interested parties to meaningfully engage with the CMA. Absent such a procedural framework, it is unlikely that the CMA will have access to the input it needs to design effective interventions, address key concerns and avoid the risk of unintended and adverse consequences, including a chilling of innovation and decreased appetite for investment in the UK economy as a whole.**
  - Without clear milestones and timetables for potentially affected parties (including SMS firms, third parties and wider stakeholders) to feed into the CMA's thinking, and raise concerns effectively, there is a material risk that the CMA will not get the information it needs to ensure that the DMCC regime delivers good outcomes for consumers and the UK economy.
  - As a matter of procedural fairness, firms who may find themselves designated as having SMS in respect of a digital activity should have clear sight of the processes the CMA intends to adopt, including in respect of the SMS designation process itself. An appropriate level of input from consumers, businesses, investors and wider third-parties will help ensure the CMA has a comprehensive understanding of how its decisions will affect those parties to mitigate the risks of unintended (and potentially adverse) consequences and ensure the regime works best for all, but the CMA must also ensure that it gives sufficient weight to engagement with the potential SMS firms who will be significantly impacted by the regime. Further, clear timings and staging-posts will enable parties, particularly smaller parties, to prepare for that engagement and allocate resources accordingly.

- The Draft Guidance should be supplemented to include procedural timelines / milestones, in a similar manner to other regimes (e.g., the market investigation and mergers regimes) operated by the CMA. While there may be a need for adaptations given the novelty of the DMCC regime, there is no reason why it warrants an entirely different approach.
3. **The Draft Guidance does not reflect the CMA’s aim for the DMCC to be an “evidence-led”<sup>2</sup> regime, which may limit the information available to inform the CMA’s decisions and, again, increase the risk of unintended and adverse outcomes.**
- Given that the DMCC regime will relate to complex, fast-moving businesses, which are subject to ever evolving competitive constraints from players with a range of business models, it is vital that the DMCC regime be evidence-led, with pertinent information gathered from appropriate stakeholders. The Draft Guidance should therefore be updated to include further detail on the *types* of evidence (for example surveys, evidence of entry/expansion etc.) the CMA is likely to consider relevant to its decisions under the DMCC Act and the factors it will consider in assessing that evidence. This will ensure that all parties are better able to allocate resources to evidence sources most likely to assist the CMA, and allow parties to prepare evidence in a timely fashion, thus navigating the short timescales in the DMCC Act and long lead time for certain evidence types.
  - The CMA should explicitly commit to basing its decisions on evidence (which it is well-placed to obtain given the breadth of its information gathering powers), and in line with established economic principles. Unlike the guidance in other CMA regimes, the Draft Guidance does not currently provide analytical frameworks through which evidence will be considered – it is important that these are built in to the final Guidance.
4. **The Draft Guidance does not clearly explain how the CMA will exercise its discretion in critical areas where there is the greatest chance of adverse outcomes, creating significant uncertainty for all parties who will be affected by the regime.**
- The DMCC Act gives the CMA broad discretion and potentially far-reaching and expansive powers which go beyond those seen in other national and international competition regimes (for example, in relation to varying and testing powers). Indeed, the CMA has itself recognised that its new powers are “substantial” such that a “targeted” and “proportionate” approach is warranted.<sup>3</sup>
  - However, at present, the Draft Guidance does not include appropriate guardrails and frameworks for the CMA’s most expansive powers, where there is the greatest risk of unintended and adverse consequences. While we recognise that the CMA wishes to retain flexibility, it is crucial that the Guidance makes clear, in relation to these powers, how the CMA intends to exercise its discretion and ensure that these powers are used in appropriate, specific and limited circumstances, in accordance with its stated desire to ensure a targeted and proportionate approach.
  - In particular, the DMCC Act gives the CMA broad information gathering powers and it can require information from any business or person. The Guidance must put in place appropriate guardrails to ensure that these powers are used proportionately (for example in respect of firms which may be designated as SMS in respect of a certain digital activity, and in relation to the relevant digital activity, rather than pursuing other digital activities / other parts of those firms’ businesses, unless there are exceptional circumstances). The Guidance should also include strengthened obligations on the CMA to issue requests in draft form where possible in order to ensure that: the firm is able

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<sup>2</sup> The importance of an “evidence-based and proportionate approach” was stressed by Sarah Cardell in a speech delivered during the January 2024 Concurrences Tech Antitrust Conference, Palo Alto, USA. See her response to question 3 of <https://www.gov.uk/government/speeches/the-cmas-approach-to-digital-markets-regulation>.

<sup>3</sup> *Ibid.* See question 3.

to provide the information requested, and provide it in the format requested; and to prevent requests from being unduly burdensome. This is equally important for smaller firms, who may have fewer resources.

- Further, the CMA has powers to require firms which may be designated as SMS in respect of a certain digital activity to vary their conduct and/or carry out live testing on customers. Given that the outcome of such testing is often unknown, the exercise of such powers carries a real risk of adverse or unintended consequences. The disproportionate use, or ill-considered design of varying and testing powers by the CMA could, for example, risk customers losing trust in SMS firms, or an SMS firms' services being unexpectedly altered without appropriate notice to its business or end-consumers. It is therefore imperative that appropriate guardrails (such as setting out, at the start of a test, outcomes of the test that would trigger competition concerns and those that would not, and the reasons for this assessment) are placed on these powers to ensure they are only used in relation to designated activities (rather than on activities that could be designated) and where the CMA's less invasive information gathering powers have proved insufficient. This will reduce the risk that such interventions could have broader negative effects on competition (including competitors) and investment and innovation in the UK, to the detriment of end-consumers in the UK.

**5. The Guidance should use more decisive language and include more illustrative examples to ensure certainty, predictability and transparency.**

- Many sections of the Draft Guidance are equivocal, non-committal and open, providing the CMA with substantial discretion. For example, the CMA often states in the Draft Guidance that it "*may*" or is "*likely to*" (rather than "*will*") take certain considerations into account before exercising a power. This leaves parties with an unacceptable level of uncertainty as to when the CMA might or might not use certain powers or make certain assessments.
- While we recognise that there will need to be some flexibility in the overall regime, and it is difficult for the CMA to include examples covering every possible scenario given the breadth of firms which could be subject to SMS designation and bespoke CRs, there is a general lack of examples in the Draft Guidance. It would be helpful for the CMA to supplement the Draft Guidance in this regard, including with illustrative / worked examples where possible, and an explanation of when they may be most relevant, as it does in other competition regimes.

**6. The CMA's assessments should be UK-centric.**

- The CMA should focus its assessments on the 'digital activity' and the SMS firm's activities within the UK before deciding to make an intervention, predominantly because the CMA should be seeking to ensure that UK consumers and businesses benefit from the regime.
- The Draft Guidance should be reconsidered from this perspective, and the assessments should make clear that the CMA's starting point will be the 'digital activity' within the UK. Indeed, this is essential to ensure that the CMA is taking a proportionate approach, which appropriately balances the need for intervention, with the harm the CMA is seeking to prevent.
- This would not of course preclude the CMA from assessing conduct more broadly where required.

**7. The Guidance must reflect that, in using its powers, the CMA should target any interventions so SMS firms remain free to innovate and challenge incumbents in non-designated activities.**

- Consumers are best served when all firms are free to innovate and stimulate competition. The CMA's enforcement of the regime will only be proportionate if interventions by the CMA are

generally limited to the activity for which the SMS has been designated, and in respect of which the CMA will have carried out an extensive (nine-month) SMS designation exercise to understand the relevant activity and the competitive constraints and conditions affecting it.

- If the CMA's interventions stretch beyond this to the wider company, in respect of activities for which the firm has not been designated as SMS, the CMA risks imposing interventions on digital activities in which the relevant firm has no significant market power and in relation to which it will not have conducted a thorough review of competitive dynamics.
- This inevitably means that such interventions carry higher risks of adverse and unintended consequences, including the dampening of innovation and investment into non-designated activities more generally, as it will be less attractive for firms to enter or expand into unrelated activities and inject choice, competition and innovation into those markets, if it is unclear whether such markets will be affected by far-reaching and unforeseen competition regulation. This would, in turn, drive negative outcomes for UK consumers (who will not have the benefit of such investment and innovation), and competition would be adversely affected. Rather than strengthening competition through innovation, such a regime would undermine it.
- Accordingly, the Guidance must make clear that any interventions will predominantly be targeted at the relevant digital activities, rather than company-wide. We urge the CMA to more clearly explain when it would exercise powers to intervene in relation to non-designated activities and to state that this would only be done in exceptional circumstances.

## Chapter 2 of Draft Guidance: Strategic Market Status (SMS)

### A. Summary of key comments

1. For the reasons set out in detail below, it is necessary for the CMA to significantly enhance the SMS chapter in the Draft Guidance to: (i) provide a clear description and framework for the procedural steps that the CMA proposes to follow during the nine-month SMS designation process; (ii) provide further clarity on the evidence the CMA is likely to consider relevant for SMS assessments; and (iii) ensure appropriate guardrails on the CMA's discretion in several areas. The current text lacks the level of detail required to provide legal certainty and transparency for all relevant stakeholders so as not to undermine incentives for investment and innovation in the UK. To ensure clarity and fairness, particularly given the far-reaching consequences of SMS designation, substantial revisions are required.
2. SMS designation is the fundamental baseline from which the DMCC regime stems. It is therefore of crucial importance that the Guidance enables a robust, effective and accurate SMS assessment. This can be achieved only by having a clear understanding of the operation of the relevant digital activity and the competitive dynamics within that market, so that any interventions align with commercial realities; are targeted at genuine competition law concerns; and avoid unintended consequences, for example by preventing competition on the merits, or unfairly impacting the many small and medium businesses who rely on potential SMS firms to reach their customers. Such unintended consequences could risk undermining innovation or investment incentives in the UK.
3. In order to maximise the CMA's prospects of making an accurate SMS assessment within the challenging nine-month statutory timeframe, it is crucial for such SMS assessment to be made in accordance with a clearly defined process including procedural timelines and milestones for engagement at critical junctures. This will facilitate efficient information collection and help all relevant stakeholders (including potential SMS firms, third parties and wider stakeholders) plan effectively and stay on track to meet CMA deadlines. The Draft Guidance currently lacks this essential detail.



4. The Draft Guidance also lacks a clear analytical framework for the CMA's substantive assessment of whether a firm has "*substantial and entrenched market power*" and rejects the use of standard analytical tools and well-established concepts, including those used by the CMA in related cases. This represents a clear departure from other regimes (e.g., market studies / investigations). The Draft Guidance also lacks detail on the types of evidence the CMA will consider as part of its SMS assessment, and how it will approach the assessment of that evidence, which results in a lack of transparency and prevents relevant stakeholders from ensuring they provide the most helpful and relevant evidence to aid the CMA's assessments.
5. The lack of a clearly defined process, analytical framework and detail on evidence represent marked departures from the approach the CMA adopts in relation to its merger, market, and antitrust investigations, and creates legal and procedural uncertainty for all parties concerned. Whilst it is true that the DMCC regime is novel, it is not clear why a wholesale departure from the CMA's previous approach and learnings is merited for SMS designation, especially given the profound consequences SMS designation will have for the relevant firm (despite there being no suggestion or finding that the firm has breached competition law). If anything, it is even more important in a new, untested regime to have clear guidance on process and evidence gathering (among other things) to ensure stakeholders are properly heard and that the CMA has the best chance of achieving positive outcomes for all parties. That guidance should draw on the established experience of the CMA (and concurrent regulators) in administering other regimes.
6. While an exact replication of content would plainly not be appropriate for a novel regime, affected stakeholders will expect the procedural and analytical framework set out in the Guidance to provide at least the same level of detail as is contained within, for example, the CMA's guidance on market studies and market investigations. This will enable the CMA to apply the same level of rigour when analysing markets in SMS investigations as it does when analysing relevant markets in other types of investigations, and ensure its SMS decisions are robust and tenable.
7. To address these concerns, the CMA should supplement the SMS chapter of the Draft Guidance with:
  - 7.1. a clear and comprehensive statement of the procedural steps the CMA expects to follow during the nine-month SMS designation process, with a detailed timetable including the key milestones (e.g., site-visits, working papers, and oral hearings) and more informal touchstones (e.g., state of play meetings, economist calls) in order to provide greater legal certainty to all stakeholders. This timetable should reflect all of the steps from the CMA issuing an investigation notice to the potential SMS firm, through to the issuance of the SMS decision notice, and should clearly define the processes in place to ensure there is sufficient and meaningful engagement between the CMA and the potential SMS firm, as well as third parties, throughout the designation process; and
  - 7.2. a clear analytical framework setting out how the CMA will undertake the substantive SMS assessment, with more detail on the types of evidence it will consider when making that assessment, and the weight it expects to apply to such evidence. Although the Draft Guidance provides some examples of evidence that may be relevant to an assessment of market power in general (see paragraphs 2.41 and 2.43), it does not explain the analytical framework or the types of evidence that will be relevant to its assessment of the "*substantial*" and "*entrenched*" conditions specifically. Whilst we understand that the application of the DMCC regime will necessarily be nuanced and this will, to an extent, vary on a case-by-case basis, it is imperative that the CMA provides a clear analytical framework for its assessment of the "*substantial*" and "*entrenched*" conditions, and an indication of the types of evidence that would be likely to assist it in assessing these questions, so as to ensure relevant stakeholders are most able to provide helpful and relevant evidence to the CMA. This is especially important given that the Draft Guidance notes that these concepts are distinct from the well-established concept of dominance.
8. For the avoidance of doubt, updating the Draft Guidance in this manner would not involve introducing any quasi-legislative tests but, rather, will provide the necessary clarity on how the wide discretion provided by the legislation will be applied by the CMA. Indeed, that is the very purpose of the Guidance.

## B. SMS investigation procedure

9. The Draft Guidance does not provide any details on the process or timetable for conduct of an SMS designation. This creates uncertainty for all stakeholders, and increases the risk that the CMA will not be able to access the information it needs to conduct a robust and credible assessment in the short timeframe available.
10. In particular:
  - 10.1. the Draft Guidance does not specify the timing for the proposed decision. The Draft Guidance should be updated to ensure that (further to paragraph 2.83) the proposed decision is published with sufficient time for both the firm and third parties to be able to make informed submissions and representations on its content, and for the CMA to properly consider this feedback. With this in mind, we consider that it would be appropriate for the proposed decision to be published during the course of month six of the nine-month SMS investigation; and
  - 10.2. there are no steps outlined between the initial invitation to comment (set out in paragraph 2.82) and the publication of the proposed decision (set out in paragraph 2.83). Given that this phase constitutes a critical part of the nine-month process, this is a significant omission.
11. The lack of a clear timetable or process represents a stark departure from the CMA's approach in its other guidance (e.g., mergers/market investigations) which set out a clear and detailed timetable for the different stages of an investigation. Whilst we understand the DMCC regime is novel, and it may not be possible (or appropriate) to precisely mirror the timetables used in other regimes, if anything, the novelty of the regime makes it even more important for the CMA to provide timetables and details on how the regime will be enforced, so that firms which may be subject to the regime (and third parties who may have an interest in the outcomes of enforcement activity) understand how the law will be applied.
12. A clear and detailed process is even more important in relation to SMS designation given that:
  - 12.1. this is the key building block for the whole DMCC regime;
  - 12.2. the CMA will be required to conclude its SMS assessment within nine months, which is likely to be a challenging timetable given the complex digital markets that the CMA will need to consider (and bearing in mind that the CMA's most recent market studies involving digital services have taken 12 months to complete); and
  - 12.3. the CMA has given a clear steer in the Draft Guidance that it will not be receptive to arguments raised late in the day. It is therefore imperative that the Guidance ensures that all parties have opportunities to engage meaningfully with the CMA throughout the designation process - leaving engagement with relevant parties until the proposed decision (particularly in circumstances where, as above, the date of such decision is not specified) is simply too late.
13. The CMA should therefore amend the Draft Guidance so that it includes a comprehensive process with an indicative timetable outlining how the CMA will conduct the nine-month SMS designation process, with key milestones for engagement with SMS firms and other interested parties reflecting the steps outlined in the Draft Guidance. The timetable should provide sufficient opportunities for genuine engagement both before and after the CMA publishes its provisional decision.
14. At a minimum, any SMS designation should cover the steps detailed below and the Guidance must contain a workable timetable to accommodate these. Given that these process steps are all possible in a 24-week Phase 2 review, there is no reason why they could not also be accommodated in respect of the DMCC regime.

Milestone	Timetable
<b>Stage 1: Launch of investigation</b>	
CMA issues SMS investigation notice and invitation to comment	Day 1
CMA publishes administrative timetable after it is shared with the parties	Week 1
<b>Stage 2: Initial information gathering</b>	
Teach-in / site visit	Month 1
CMA issues information requests (to the potential SMS firm and relevant third parties)	Month 1
Update calls with potential SMS firms (including economist calls where appropriate)	Throughout, at least on a monthly basis
<b>Stage 3: Preparation and publication of interim findings</b>	
CMA publishes interim findings for consultation (setting out initial views on scope of digital activities and evidence for, and against, SMS designation)	Month 4
State of play meeting	Month 4
Final deadline for all parties' (including third party) submissions before the proposed decision	Month 5
<b>Stage 4: Preparation and publication of proposed decision</b>	
CMA publishes proposed decision for public consultation	Month 6
Consideration of responses to proposed decision and Oral hearing	Months 7-8
Final deadline for potential SMS firm's submissions before the decision	Months 8-9
<b>Stage 5: Decision</b>	
CMA publishes SMS decision notice	Month 9

### C. Substantive SMS Assessment

a) No analytical framework for assessing substantial and entrenched market power and rejection of existing analytical tools

15. One of the substantive SMS conditions for designation is that a firm must have “*substantial and entrenched market power*”. However, the Draft Guidance does not contain a clear analytical framework for assessing these new and undefined concepts. Rather, paragraph 2.42 of the Draft Guidance simply notes that “*substantial*” refers to “*the extent of market power*” and “*entrenched*” is intended to ensure that market power is not “*transient*”. The Draft Guidance goes on to state that: (i) these two concepts are “*distinct*” but

*“not entirely separate”*; and (ii) *“assessing substantial and entrenched market power does not require the CMA to undertake a formal market definition exercise”* and *“instead, the CMA’s assessment will focus more broadly on the competitive constraints applying to the SMS firm”*.

16. The result is a lack of clarity in the Draft Guidance as to how the CMA will approach its assessment or interpret the concepts of *“substantial”*, *“entrenched”* and *“market power”*. In particular:

16.1. The Draft Guidance states that *“entrenched”* means market power that is *“not transient”*. This is a very low hurdle, which is inappropriate given the potential consequences of SMS designation for firms. Whilst the Draft Guidance indicates that the CMA will consider evidence similar to that in its market, merger, and CA98 investigations to determine market power, it is unclear how this will apply to its assessment of entrenchment (and the *“substantial”* condition) specifically. As such, the CMA should provide more information as to how it will interpret this, particularly when conducting assessments on a forward-looking basis over a five-year period in relation to fast-moving and dynamic sectors. This will ensure that parties are able to provide the CMA with the most relevant information in order to best assist the CMA with its assessment.

16.2. Despite acknowledging that the *“substantial”* and *“entrenched”* concepts are *“distinct”* the Draft Guidance suggests that a separate analysis of *“entrenched”* may not be necessary, as paragraph 2.52 states that 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”*. This appears to suggest that where market power is found to be substantial, there is a rebuttable presumption that it is also entrenched. This suggestion risks collapsing the two tests, and fails to reflect the dynamics of digital markets, particularly when the CMA itself acknowledges that it cannot make precise predictions about the likely development of the industry. The example of TikTok’s ascension in contrast to Facebook’s decline demonstrates how quickly market power can shift in the digital sector, and the Guidance needs to account for this commercial reality. In addition, the requirement for *“clear and convincing evidence”* is a high standard to meet in respect of the likelihood of future events (especially when the CMA acknowledges this with respect to its own analysis, noting that it will not attempt to engage in *“precise predictions”* and will instead consider whether relevant developments are likely to be sufficient in scope, timeliness, and impact to eliminate the firm’s substantial market power), and it is unclear what would meet this bar. The Draft Guidance should therefore be amended to remove this presumption.

17. The lack of guidance on how the CMA will approach substantive SMS assessment results in a lack of transparency and predictability for firms or stakeholders as to how the CMA will apply its powers of designation. It is also a marked departure from the CMA’s guidance in relation to other competition law regimes, such as mergers, where the CMA provides detailed guidance on how it will conduct its substantive analysis. For example, the [CMA’s Merger Assessment Guidelines](#) dedicate 12 pages to the legal threshold it applies in mergers – i.e., the substantial lessening of competition test. While we appreciate that the SMS concepts are new and the CMA does not have the decisional practice available to it that it has in a mergers context, we would nevertheless expect that the Guidance should be able to follow a similar framework to the Merger Assessment Guidelines and provide guidance on *“what”* these legal concepts are and *“how they might arise”*, and give examples of situations where these concepts may be met and an explanation of how the CMA assesses evidence.

18. Indeed, and by way of analogy, the UK Government introduced an entirely new regulatory regime under the Online Safety Act 2023, which came into force in October 2023 and requires Ofcom to produce guidance and codes of conduct on various topics. Despite there being no precedent law or decisional practice to rely on, Ofcom has already produced a vast amount of guidance on key concepts including its advice to the Secretary of State on the threshold conditions for categorised services, and more is to come.<sup>4</sup> This, along with the existing CMA guidance, demonstrates that despite the novelty of the regime, it is feasible for the Guidance to provide an analytical framework setting out how the CMA will undertake its substantive assessment, particularly given the importance of this in providing legal certainty to all stakeholders.

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<sup>4</sup> The two consultations and two calls for evidence Ofcom has published to-date have a combined total of more than 3,000 pages.

19. The lack of analytical framework is further compounded by the CMA's rejection of existing and well-established analytical tools used in other competition law assessments when conducting SMS investigations. For example:

19.1. Paragraph 2.10 of the Draft Guidance states that in identifying a digital activity the CMA "*will largely focus on factual information and this exercise will not require an assessment of the competitive constraints on the firm*", which is a departure from the approach to market definition in mergers, and from the looser assessment of markets in market studies and investigations.

19.2. Paragraph 2.43 of the Draft Guidance states that "*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'*"

19.3. Paragraph 2.45 of the Draft Guidance states that "*the CMA will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment*".

20. Whilst we do not expect the CMA to incorporate these concepts and tools wholesale into the new DMCC regime, it is not reasonable or pragmatic to dismiss the use of these concepts in their entirety, particularly given that the Draft Guidance does not provide a clear alternative analytical framework. These existing tools provide well-established principles which are already understood by potential SMS firms and other relevant parties, and their inclusion, even in part, will therefore provide greater legal certainty. For example:

20.1. The starting point when assessing market power is usually market definition, as this provides a useful framework for an assessment, even if a final conclusion on the same is not always needed. This is recognised in the CMA's [Guidelines for market investigations](#), which states that market definition enables it "*to focus on the sources of any market power and provides a framework for its assessment of the effects on competition of features of a market*".<sup>5</sup> Whilst it may not be appropriate or necessary to undertake a full market definition exercise in the context of an SMS assessment, the Guidance should recognise that many of the tools which usually form part of such an exercise will be helpful when conducting SMS assessments and should make clear that any assessment that the CMA makes of market power will be as rigorous as that required for CA98 and EA02 purposes.

20.2. Whilst paragraph 2.45 of the Draft Guidance states that market power is distinguishable from dominance, it is not clear how high the market power thresholds are and the Draft Guidance does not provide an analytical framework from which to make this assessment. The Guidance should, at the very least, elaborate on what makes the concepts different, and provide an indication of whether the threshold for substantial and entrenched market power is intended to be similar to that for dominance or assessed in a different manner altogether.

20.3. Similarly, whilst the types of evidence highlighted as being relevant to market power (see, for example, paragraph 2.41 of the Draft Guidance) indicate that there will be some economic analysis, any assessment of market power should be grounded in economic analysis and this should be made clear in the Guidance. This is of particular importance given that the impact (and therefore success) of any CRs predicated on an SMS designation will need to be considered from an economic standpoint.

21. In light of the above, it is of paramount importance that the CMA draws from its expertise in these areas and utilises well-established analytical techniques where this can lead to efficiencies, improve the evidence base, and ultimately drive better outcomes for all relevant stakeholders.

b) Lack of clarity on the evidence the CMA will rely on for SMS assessment

22. Paragraph 2.41 of the Draft Guidance provides some examples of the evidence that may be relevant to market power and its sources. However, as stated in paragraph 2.42 of the Draft Guidance, "*the mere*

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<sup>5</sup> Paragraph 132.

*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'".*

23. Further, paragraphs 2.63 to 2.67 of the Draft Guidance purport to set out how the CMA will assess evidence when undertaking an SMS assessment. However, this section does not, in fact, provide this information. Paragraph 2.63 commences by saying that that 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"*. This broad-brush is unhelpful.
24. At the very least, the Guidance should set out the evidential requirements for the CMA to determine whether each of the *"substantial"* and *"entrenched"* criteria are satisfied, including, for example, the factors that the CMA will take into consideration when determining whether market power is transient or entrenched. Without this, it will be difficult for firms subject to an SMS investigation to critically assess and potentially rebut such findings, and also to most efficiently provide the CMA with information which will be of relevance to its investigation.
25. In terms of the types of evidence required to conduct an SMS assessment, we recognise that this will vary case-by-case. Nevertheless, it would be beneficial if the Guidance contained some examples of the types of evidence that the CMA might consider, such as proof of multi-homing, win/loss data, customer switching or diversion (e.g., from customer surveys), ability and incentive of other firms to enter or expand, including the timeliness and strength of that entry/expansion, and so on. This is the widely-welcomed approach that the CMA has adopted in its other guidance, for example, its updated [Mergers: Guidance on the CMA's jurisdiction and procedure](#), its [Merger Assessment Guidelines](#), and its [Guidelines for market investigations](#).
26. Moreover, other UK regulators, such as Ofcom and the Civil Aviation Authority (CAA), have set out clearly the types of evidence they will consider when assessing market power. Ofcom's [Market Review Guidelines: Criteria for the assessment of significant market power](#) contain helpful tables with the types of evidence that could be used to assess significant market power. Likewise, the CAA's [Market Power Test Guidance](#) contains useful examples of the types of evidence that it will consider when assessing market power in relation to airport operators.
27. Gaining greater insight into the specific types of evidence the CMA is likely to deem helpful will enable parties to more effectively assist the CMA in addressing any queries or concerns.

c) Broad discretion on weight given to, and assessment of, evidence

28. Paragraphs 2.64 and 2.65 of the Draft Guidance provide the CMA with a very broad discretion on the weight it can place on different types of evidence. This discretion also extends to evidence gathered by the CMA in other contexts such as market studies involving potential SMS firms.
29. While we recognise that a certain degree of discretion is essential for effective regulation, a lack of clear, predictable criteria for evaluating evidence increases the risk of inconsistent outcomes and uncertainty for the business community, impacting how companies decide to invest and innovate in the UK. In particular, firms may find it challenging to navigate the investigation process, unsure of what evidence is likely to be most helpful and relevant to the CMA, how such evidence will be assessed or whether it will carry sufficient weight. This uncertainty could undermine SMS firms', and other stakeholders', ability to effectively participate in the DMCC regime and hinder their ability to compete on a level playing field and deliver choice and innovation for UK consumers.
30. In relation to the CMA's ability to rely on evidence gathered and analysis carried out in other cases, paragraph 2.65 of the Draft Guidance states that 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"*. The Draft Guidance does not, however, provide any guidance on how the CMA will exercise that discretion, nor is there any obligation on the CMA to inform the potential SMS firm when it has relied on evidence gathered outside of the SMS investigation. It is also unclear whether the CMA can rely on information gathered by any of the concurrent regulators.

31. The Guidance must include appropriate guardrails to prevent inappropriate read-across of evidence gathered in different contexts or in relation to a different time period, as relying too heavily on this type of evidence may inadvertently bias SMS investigations, particularly given the fast-pace of change in the digital sector. Circumstances change, and evidence that was relevant at one point in time, or in the context of an unrelated investigation, will no longer hold the same weight or significance as it did previously or in a different context. Without clear guidelines on how the CMA will exercise its discretion, this approach risks inconsistency and unpredictability. Firms subject to an SMS investigation need a fair and transparent process, where evidence is evaluated objectively based on its merits.
32. Paragraph 2.67 of the Draft Guidance states that the CMA will decide whether a firm meets the criteria for SMS designation based on a balance of probabilities, and an “*in-the-round*” assessment of the evidence available to it. Given the significance of SMS designation, the Guidance must make clear that while the balance of probabilities may be the appropriate standard for designation purposes, the assessment of whether or not that standard is met will only be made on the basis of clear and compelling evidence.<sup>6</sup> Furthermore, that evidence should be presented to the relevant firm so that they have the opportunity to rebut it.

d) Lack of guidance on when digital activities can be grouped together

33. As set out in paragraphs 2.13-2.15 and 2.44 of the Draft Guidance, the CMA may group two or more of the potential SMS firm’s digital activities and the products within them into a single digital activity (and the SMS assessment will relate to the grouped activity as a whole). It is possible that a firm will have “*substantial and entrenched market power*” in respect of only one of these activities, and not another, and therefore the resulting SMS designation will be unduly broad. The Guidance should make clear how the CMA intends to deal with this inherent risk, and a helpful starting point would be to tighten the criteria enabling the CMA to group digital activities together. The Draft Guidance is extremely broad in this respect, and we would welcome further clarity on when digital activities will have “*substantially the same or similar purposes*”, or when these “*can be carried out in combination to fulfil a specific purpose*” (see paragraph 2.13). Relevant factors might include where products have the same customers, or are intrinsically linked (for example, because they are sold as a bundle or one is ancillary to the other). The CMA should also consult with the potential SMS firm in making this determination in order to best understand the commercial realities of the activities and products in question.
34. In addition, given the consequences for firms of SMS designation, the reference in paragraph 2.14 of the Draft Guidance to the CMA interpreting the conditions in paragraph 2.13 “*broadly*” should be removed.

e) Revocation of SMS designation

35. Paragraph 2.103 of the Draft Guidance states that where the CMA has revoked an SMS designation, it may make transitional, transitory or saving provisions in respect of any existing obligations imposed on an SMS firm to manage the impact of the revocation on third parties who benefited from the existing obligation. However, the Draft Guidance does not contain any guardrails or framework detailing when the CMA would be able to use these powers. This could have the far-reaching consequence of transitional provisions being imposed on the SMS firm for an unknown period of time in relation to a digital activity where it no longer has entrenched market power. Therefore, the Guidance should explicitly state that this power will be used in specific and limited circumstances only, and in consultation with the SMS firm.

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<sup>6</sup> In [1001/1/1/01 Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading](#), which concerned a breach of the Chapter II prohibition of the Competition Act 1998, the Competition Appeal Tribunal (CAT) held that the “*standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*” (paragraph 109)



f) Lack of guidance on how the inherent uncertainty of a forward-looking assessment will be addressed

36. In paragraph 2.48 of the Draft Guidance, the CMA acknowledges that conducting a forward-looking assessment of substantive and entrenched market power involves a certain degree of uncertainty. Nevertheless, the CMA states that this will not prevent it from finding substantial and entrenched market power based on the evidence available to it when making its assessment, particularly as the CMA can revisit its designation if developments or new evidence indicate that a firm's market power has been significantly diminished.
37. Although Paragraph 2.111 of the Draft Guidance recognises that SMS firms may make representations to the CMA regarding an early reassessment of an SMS designation, the CMA retains full discretion to decide whether or not to do so.
38. In order to counteract this uncertainty, the Guidance should provide objective criteria as to when the CMA must consider representations from SMS firms, for example, when there has been a certain decrease in market share or number of users.

### Chapter 3 of Draft Guidance: Conduct Requirements

#### A. Summary of key comments

1. CRs will have a fundamental impact, not only on those SMS firms who will be required to amend their business practices to comply with CRs, but also on the businesses which rely on those firms, their competitors, and end consumers.
2. As the CMA has seen in, for example, its investigation into mobile browsers and cloud gaming, and Google's distribution of apps on Android devices, the digital sector is complex. The services that firms provide (and the customers that those firms service, and the markets in which those customers operate) are constantly evolving and adapting, such that an intervention which the CMA may consider appropriate at one point in time, may quickly become unnecessary or disproportionate as the digital markets / activities in which those firms operate evolve. Further, given that SMS firms often have very complicated (and interconnected) global business practices, disproportionate or unsubstantiated interventions in one area can risk creating adverse consequences for a range of stakeholders, across a variety of sectors and jurisdictions.
3. It is therefore critical that: (a) CRs are imposed only where there are legitimate concerns about fairness, open choices, and trust and transparency; (b) there are clear and evidence-based processes (with milestones and timings) in place to enable the CMA to identify these concerns<sup>7</sup>; (c) CRs are not disproportionate to those aims (which the Draft Guidance acknowledges, but fails to clearly address); and (d) CRs do not give rise to an unacceptable risk of unintended consequences.
4. At present, the Draft Guidance fails to explain how the CMA will ensure that these principles are adequately safeguarded, including, for example, by ensuring the CMA engages meaningfully with SMS firms (and other parties) to help ensure that it fully understands the impact and likely outcome of its interventions so that any CRs imposed will be effective, proportionate, and avoid unintended and potentially negative outcomes for a variety of players across the sector as a whole. It is therefore imperative that the CMA supplements the Draft Guidance in accordance with these principles, as detailed further below.
5. At present, the Draft Guidance contains insufficient detail regarding the CMA's intended engagement process with SMS firms (or indeed third parties), or the timing for the same. SMS firms will inevitably have valuable insights for the CMA to consider when designing CRs, and assessing whether they are likely to be effective and proportionate. Similarly, those who rely on SMS firms' businesses, or use their products, will have important views on how CRs should be shaped and it is important the Guidance provides an appropriate forum for the voices of customers. In short, a collaborative approach to CRs will lead to a better outcome for all parties concerned, and the Guidance should clearly explain how this engagement will be

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<sup>7</sup> See footnote 2 above.



managed. As with SMS designation, the Guidance should therefore include a clear process for engagement between the CMA, SMS firms and third parties, with a set of milestones and indicative timings to explain how that engagement will be managed.

6. The Guidance should also explain how the different types of investigations under the DMCC regime will interact and how far into the SMS designation process the CMA will start to consider CRs. The current approach of allowing the CR process to be conducted in parallel with the SMS designation process risks the CMA pre-judging SMS designation, and spending time designing CRs without being apprised of all the facts. While it is important for the CMA to start considering potential CRs at an early stage, doing so in parallel to the (already compressed) nine-month designation process, when the CMA is still receiving and assessing evidence as to the competitive constraints on a potential SMS firm and the extent of its market power, risks imposing CRs which are ineffective and untied to the concerns that they are designed to address. This is particularly the case given that it is this evidence which should also form the foundation of any assessment of CRs which are intended to be bespoke to that firm. From a practical perspective, it may also be difficult for SMS firms, and other stakeholders, to engage meaningfully with the CMA on potential CRs at the same time as they are engaging with the CMA on potential SMS designation. Hence, running these processes in parallel may have the unintended consequence of reducing the quality of engagement by potential SMS firms and other stakeholders, leading to poorer outcomes for all.
7. Finally, while the Draft Guidance outlines the CMA's analytical approach to CRs, more clarity is needed to ensure that stakeholders understand the CMA's approach to identifying the aims of CRs, given the potentially far-reaching consequences they could have. In particular:
  - 7.1. the CMA should include worked through examples by way of illustration of the principles. We understand that it is difficult to provide examples that capture all nuances of a regime intended to apply across very different firms, but illustrative examples are helpful and do not remove the CMA's ability to consider issues on a case-by-case basis. Consistent with the guidance that the CMA has produced in other contexts, the CMA should include clear and detailed examples which set out the circumstances when certain factors will be more or less relevant.
  - 7.2. The CMA should also amend the Draft Guidance to provide further clarification on its intended approach to applying CRs to non-designated activities and the aims of CRs, as well as on assessing proportionality and consumer benefits of CRs, as detailed further below.

## B. The CMA's analytical approach to imposing CRs

### a) Lack of clarity on identifying the aims of CRs

8. The Draft Guidance rightly notes that the starting point in imposing a CR is identifying what the CR is intended to achieve (paragraph 3.19) and that this aim will typically be more specific than the overarching statutory objective(s) (i.e., fair dealing, open choice, and/or trust and transparency, as set out in section 19(5) of the DMCC Act) for which it is imposed. However, the Draft Guidance fails to provide meaningful detail on what this means in practice. Given that the CMA may only impose a CR where it considers it proportionate to do so (as per paragraph 3.6 of the Draft Guidance), further guidance is required to ensure that the CMA is only imposing CRs within the bounds of its statutory powers, and that parties can engage constructively on the design of CRs which meet the identified objective and deliver positive outcomes.
9. As a starting point, the Guidance should provide more detail on the specific factors which will be considered by the CMA when identifying the aim of a CR, which should include, for example, the specific concern to be addressed, what success would look like, who the CR will impact (and how), and what further changes might be expected to be seen in the relevant competitive dynamics as a result of the CR. This will ensure that CRs are sufficiently targeted and focused on specific outcomes.
10. While paragraph 3.20 of the Draft Guidance contains what is termed an "*illustrative example*", it is vague, and not particularly informative. It suggests that it would be clear for the CMA to impose an obligation to "*use data fairly*" (as opposed to simply requiring the SMS firm to meet a "*fair trading*" objective). In practice, we have seen the huge complexity of data use obligations under both the DMA (regarding consent) and the

commitments on the use of third-party seller data on Amazon’s Marketplace platform, made to both the CMA and the European Commission. From these processes we have learnt that significant engagement is required on both sides in advance of implementation to understand what these obligations mean in practice. Based on our experience, significantly more detail would be required to provide any meaningful basis for SMS firms or third parties to engage effectively in relation to the ability of proposed CRs to deliver the CMA’s desired outcomes. The Draft Guidance does not appear to acknowledge this complexity, which flows through to the lack of process. As set out below, it is imperative that there is a clearly laid out process for engagement to enable these types of input from firms and stakeholders throughout the CR process.

11. Similarly, the evidentiary factors to be considered, which are set out in paragraphs 3.22 to 3.23 of the Draft Guidance, are extremely vague and high-level, and do not provide sufficient detail to provide meaningful guidance. To address this, the CMA should include several properly worked illustrative examples, as it does with guidance elsewhere, for example in the [Green Agreements Guidance](#): Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements and the Guidance on the application of the [Chapter I prohibition in the Competition Act 1998 to horizontal agreements](#).<sup>8</sup>
12. The examples that the CMA includes in other guidance notes are used and referred to regularly by firms seeking to understand how the law may apply in specific cases, and responses to the CMA’s previous guidance consultations demonstrate that respondents often point to the merits of including illustrative examples.<sup>9</sup> While it is not expected that the Guidance could include examples covering every individual case the CMA may be considering, including more (and detailed) examples will allow firms to better understand how the CMA is likely to apply the relevant principles to different scenarios, which provides valuable insight into how the CMA might assess the case at hand. Given their utility, there is no reason for the CMA to depart from its established practice of using illustrative examples in this case, particularly for a new regime where there is inherent uncertainty and a lack of legal precedent to demonstrate how the CMA will enforce.

b) Lack of clarity regarding the proportionality of CRs

13. Paragraphs 3.30 to 3.33 of the Draft Guidance set out how the CMA will assess whether a CR is proportionate. The approach in the Draft Guidance is flawed and should be amended as follows:

13.1. Paragraph 3.30 sets out four cumulative criteria which the CMA will use to determine if the proposed CR is proportionate. One of these states that the CR “*does not produce disadvantages that are disproportionate to its aim*” (paragraph 3.30(d)). This sets too high a bar by requiring negative consequences (which is implicit in the reference to “*disadvantages*”) before a CR will be disproportionate, when it should instead be sufficient that any consequences are unintended. This criterion should therefore be amended to focus on the likelihood of unintended consequences. This is particularly important given: (a) the CMA’s ability to impose CRs on non-designated activities (see subsection d) below), which makes its powers very extensive; and (b) the potential for CRs to adversely impact innovation. This approach would ensure a more balanced and comprehensive evaluation of proportionality.

13.2. Paragraph 3.33 of the Draft Guidance places a responsibility on SMS firms and third parties to identify the likely effects of CRs and provide relevant evidence on the same. Whilst SMS firms will obviously have relevant evidence as to the effects of CRs on their businesses, placing the responsibility on SMS firms and third parties risks an inappropriate outsourcing of the CMA’s responsibilities, particularly

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<sup>8</sup> In the latter, the CMA first sets out the legal framework, then an overview of how agreements should be assessed (including the analytical framework) before looking at how the rule applies to specific types of agreements with worked examples in each case.

<sup>9</sup> For example, in the responses to the CMA’s consultation on the CMA’s draft guidance on horizontal agreements, a number of those published on the CMA’s website explicitly request that the CMA include examples to illustrate how the law applies. See, for example, paragraph 3.1 of British Brand Group’s response, paragraphs 2, 4 and 5 of Cleary Gottlieb Steen & Hamilton LLP’s response, paragraph 1.2.5 of Clifford Chance LLP’s response, paragraph 1.2.3 of Dentons UK & Middle East LLP’s response, paragraph 3.6.1 of Eversheds Sutherland’s response, paragraphs 23 and 96 of Linklaters LLP’s response, and paragraph 2.2 of the City of London Law Society’s response.

when it has substantial information gathering capabilities at its disposal. To avoid this, the Draft Guidance should be amended to provide that where the CMA considers that it has not received the evidence it needs from firms, or considers that there are gaps, it should ensure that it makes use of its information gathering powers to obtain the relevant evidence before making conclusions based on a perceived lack of evidence. We note in this respect that, as we explain throughout this response, it is not always clear from the Draft Guidance what types of evidence (for example surveys, evidence of entry/expansion etc.) the CMA is likely to consider relevant (in this case to the effects of CRs) and therefore the Draft Guidance should be amended to include this, to ensure stakeholders have the best chance of providing the most relevant and helpful evidence to the CMA.

14. Furthermore, paragraph 3.33 of the Draft Guidance envisages SMS firms and relevant third parties feeding into the assessment of proportionality when the CMA issues an invitation to comment early in the CR design process and/or when the CMA consults on proposed CRs. However, these steps are too far apart. To enhance the process, the Draft Guidance should be amended to allow for additional stakeholder engagement during the interim period. This will facilitate the CMA in making evidence-based and robust decisions.

c) Consumer benefits should be substantiated

15. Paragraph 3.10 of the Draft Guidance stipulates that before imposing a CR or combination of CRs, 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*”. However, the CMA should go beyond mere consideration and instead be required to substantiate the likelihood of these consumer benefits materialising with robust and compelling economic evidence before imposing any CRs. This will ensure that potentially far-reaching interventions are only imposed where there is sufficient certainty that they will deliver positive outcomes.

d) Lack of clarity on CRs applying to non-designated activities

16. Section 20(3)(c) of the DMCC Act allows the CMA to impose CRs in relation to an SMS firm’s conduct in a non-designated activity. This is an extremely extensive power, which affords the CMA broad discretion to intervene in non-designated activities where it has, by definition, not conducted any real assessment of the activity in question. It is therefore important that the Guidance provides greater clarity on:
  - 16.1. when the CMA intends to exercise this power, including whether this will only be to address behaviour relating to a designated activity, in order to reduce uncertainty; and
  - 16.2. how it will do so in an appropriately proportionate and targeted manner given the potential impact on firms and stakeholders.
17. Paragraph 3.14 of the Draft Guidance explains that the CMA’s focus will be 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)*”. However, it does not specify the factors which will inform the CMA’s assessment, including those which might indicate that this could either be the case or could lead to potential harm to consumers and competition. A more detailed explanation of these factors would provide greater clarity and guide firms in understanding the CMA’s approach. Furthermore, the CMA should be required to take account of the potentially significant benefits which can arise when a firm expands into new activities such as new competitive pressures and more choice for consumers.
18. Section 20(3)(d) of the DMCC Act permits the CMA to impose a CR to prevent an SMS firm from “*requiring or incentivising*” users of one of the SMS firm’s products to use one or more of its other products alongside services comprised in the relevant digital activity. This is set out in paragraph 3.15 of the Draft Guidance.

However, the Draft Guidance does not explain what factors the CMA will consider before imposing such CRs and what types of evidence it will typically consider when assessing this.

19. In many circumstances, firms expanding into new activities can, in fact, drive significant benefits by creating new competitive pressure and potentially creating entirely new categories. There is also no guarantee that a new service or product launched by a firm with market power in another area will be successful, and extra limitations may prevent it from disrupting incumbents in otherwise static sectors. As such, the lack of clarity in the Draft Guidance on where concerns could potentially arise risks reducing the overall dynamism within different sectors and could limit the pressure on incumbents to innovate.
20. Therefore, to provide greater legal certainty for stakeholders, the Guidance should set out the factors relevant to the CMA's assessment, which should be reflective of existing case law on reverse leveraging. These are likely to include:
  - 20.1. whether the firm has market power in the related activity;
  - 20.2. whether there is a sufficiently strong link to the designated activity and how the CMA will go about assessing this; and
  - 20.3. the nature of the innovation or service improvement means that it could materially increase the extent of linkage with the designated activity in a way that could potentially foreclose rivals.<sup>10</sup>

### C. Procedure for imposing CRs

#### a) Lack of appropriate timetable, milestones and considering CRs in parallel with SMS designation

21. As with SMS designation, it is important that the Guidance includes a clear process of engagement between the CMA, SMS firms and third parties with a set of milestones and indicative timings. This is crucial to ensure that the design and interpretation of the CRs address the issues identified by the CMA.
22. Under the DMCC Act, the CMA has the discretion to run its CR investigations in parallel with its SMS designation investigations. However, this is a choice left open by the legislation, rather than a legal requirement; indeed, the DMCC Act notes only that consultation on CRs "*may*" be carried out at the same time as consultation on SMS designation (section 24(3)) and requires that CRs be kept under review (section 25). Simultaneously conducting the CR process and the designation process poses several risks, and will lead to worse outcomes for all stakeholders.
23. First, and most broadly, the SMS designation process enables the CMA to investigate in detail the "*competitive constraints*" on a firm and the extent of its market power. This assessment should enable the CMA to understand in detail the digital activity, competitive dynamics and how a firm's business practices relate to these. As such, by definition this SMS analysis should be the foundation of and starting point for any assessment of CRs (particularly given that these are intended to be bespoke). To undertake a CR investigation before the SMS assessment has been finalised is inherently flawed and risks the CMA imposing CRs that are not only ineffective and disproportionate, but which have significant unintended consequences for all stakeholders.
24. Secondly, concurrent investigations risk the CMA inadvertently pre-judging the outcome of SMS designation, as the CMA will form preliminary conclusions about a firm's "*strategic market status*" before

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<sup>10</sup> In Case T-612/17 *Google Shopping v Commission* (20 December 2022), the General Court held that leveraging a dominant position into a neighbouring market is not prohibited as such, even if it has exclusionary effects; as excluding less efficient competitors can be part of normal competition. However, leveraging can violate Article 102 TFEU when it departs from competition on the merits and has anti-competitive effects. Whether this is the case depends on the facts of the specific case (paragraphs 162 et seq.).

fully evaluating all relevant evidence. This premature judgement is likely to impact the impartiality and fairness of the SMS designation procedure, as well as undermining a firm's rights of defence.

25. Thirdly, it will likely lead to conflicting priorities and resource allocation challenges within the CMA. The two processes involve distinct considerations: the designation process focuses on identifying SMS firms with significant and entrenched market power, while the CR process aims to impose specific obligations on SMS firms based on identified concerns. Combining these processes will conflate the two separate considerations and result in inadequate attention being given to either aspect. Additionally, one of the central (and distinctive) elements of the DMCC regime is that the CMA has the ability to introduce bespoke CRs - running CR investigations concurrently with SMS designation investigation undermines this, as the CMA will not have the ability to sufficiently customise the designs of CRs until the designation investigation is complete.
26. Fourthly, running both processes concurrently will likely limit stakeholder engagement. SMS firms, industry experts, and other relevant parties need sufficient time to provide input and influence the design of CRs. If rushed, this collaborative aspect will suffer, potentially leading to suboptimal outcomes for all parties, including consumers in the UK.
27. Finally, the complexity of managing two parallel processes increases the risk of procedural errors, inconsistencies, and delays. Clear separation and sequential execution would mitigate these risks.
28. As with the SMS designation procedure, the Guidance should set out clear milestones with indicative timings to allow for sufficient engagement between the CMA, SMS firms and third parties throughout the CR procedure. Paragraph 3.47 of the Draft Guidance identifies some mechanisms for engagement between the CMA and third parties including bilateral meetings and/or roundtables. However, these are presented as actions that the CMA "may" take. Similarly, paragraph 3.39 of the Draft Guidance provides that 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. This is not sufficient and leaves parties with uncertainty as to how they will be able to engage with CR investigations. Proper engagement is essential to ensure that the CMA has the information it needs to conduct a thorough and robust assessment of proposed CRs in a timely fashion. In both cases, the CMA should commit to providing these opportunities for engagement in the final Guidance.
29. At a minimum, the CR investigation should cover the steps detailed below and for the Guidance to contain a workable timetable to accommodate these. We have suggested a draft timetable below based on a relatively short six-month period, but suggest that the timetable should be lengthened if needed depending on the proposed CR in question. Stage 4A provides for a further public consultation in the event that substantive amendments are made to the draft CRs and/or interpretative notes as a result of the initial consultation at Stage 3. Whilst this is not currently envisaged in the Draft Guidance, it is necessary in order to ensure that the CMA meets its objective of seeking input from a wide range of stakeholders before imposing CRs (see paragraph 3.41 of the Draft Guidance). It is also consistent with the approach adopted by the CMA in the context of accepting commitments during CA98 investigations, where if a business offers revised commitments including significant changes, the CMA will allow another opportunity for complainants and any other third parties to express their views in respect of the same (see paragraph 10.24 of the [Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8](#)).
30. To the extent that the CMA proceeds with its current intention to run CR investigations concurrently with SMS designation, then it should carefully manage the timing and coordination of these processes, to ensure a thorough and neutral assessment of SMS designation. In addition, the Guidance must explain how the two procedures will interact and when the CMA can commence the CR investigation (i.e., how far into the SMS designation investigation can the CMA start considering CRs). In this respect, the CR process should not begin until the CMA has identified provisional findings (i.e., in accordance with the timetable suggested in the SMS Designation chapter above - around three to four months before the end of the SMS designation

process). This may mean conducting the consultation on CRs at a later date than the consultation on SMS designation, as allowed for in the DMCC Act (section 24(3)).

<b>Milestone</b>	<b>Timetable (indicative only, and not subject to statutory time limits)</b>
<b>Stage 1: Initial information gathering</b>	
CMA issues information requests (to the potential SMS firm and relevant third parties) to understand any potential concerns which may need to be addressed by CR(s)	Month 1
Update calls with (potential) SMS firms (including economist calls where appropriate)	Throughout, at least on a monthly basis
<b>Stage 2: Launch of CR investigation</b>	
CMA publishes Invitation to Comment (setting out the aim of the proposed CR(s) and any initial views on the type and proportionality of the CR(s) being considered)	Month 2
Final deadline for all parties' (including third party) submissions before the proposed decision	Month 2-3
<b>Stage 3: Preparation and publication of consultation on proposed CR and proposed interpretative notes</b>	
CMA publishes draft CR(s) and interpretative notes for public consultation	Month 3
CMA engagement with the SMS firm and relevant third parties to discuss their feedback on the draft CR(s) and interpretative notes (including via bilateral meetings, roundtables and written responses)	Month 3-4
Final deadline for all parties' (including third party) submissions before the proposed decision	Month 5
<b>Stage 4: Amends to the draft CR(s) and interpretative notes as a result of the consultation</b>	
Further CMA engagement with the SMS firms and relevant third parties (in light of consultation responses)	Month 6 (may be extended if amends required are substantial)
<b>Stage 4A (if required): If there are substantive amends to the draft CR(s) and interpretative notes, preparation and publication of an additional consultation</b>	
<i>CMA publishes amended draft CR(s) and interpretative notes for public consultation</i>	<i>[Timing dependent on extent of amends required]</i>
<b>Stage 5: Preparation and publication of CR notice</b>	
Publication of final CR notice and interpretative notes	Month 6 (may be extended as appropriate)
<b>Stage 6: Implementation</b>	
CMA engagement with the SMS firm and relevant third parties on the implementation of the CR(s) – SMS firm to provide the CMA with its plan to comply with the CR(s)	Month 7 onwards
Implementation date	<i>[Timing dependent on complexity of CR, and implementation steps required]</i>

e) Timing of imposition of CRs

31. Under the DMCC Act, the CMA has the power to impose CRs at any point in time. Paragraph 3.35 of the Draft Guidance states that the CMA will “*typically impose an initial set of CRs as soon as practicable following an SMS designation*”. In addition, paragraph 3.36 of the Draft Guidance enables the CMA to impose additional CRs throughout the designation period. However, the Guidance should recognise that the CMA will only impose additional CRs in specific and limited circumstances, for example, when it is clear that the existing CRs have not and are not capable of resolving the issue previously identified.

f) Lack of clarity on interpretative notes

32. Paragraph 3.53 of the Draft Guidance explains that the CMA “*may publish*” interpretative notes to accompany CRs. As acknowledged by the CMA in paragraph 3.54 of the Draft Guidance, interpretative notes “*will provide greater clarity over the CMA’s interpretation of a CR*”, yet they are presented in the Draft Guidance as being optional. Except in the most simple / obvious cases, the CMA should be required to publish interpretative notes in respect of any CR which it imposes, as this will provide stakeholders with greater legal certainty and transparency and also reduce the risk of misunderstandings between the CMA and the SMS firm as to the scope of the CRs. Such misunderstandings may otherwise lead to unnecessary enforcement action and delayed outcomes from the CMA’s perspective, where clarity could have been achieved at the outset.
33. Paragraph 3.56 of the Draft Guidance provides for CMA engagement with the relevant SMS firm to update the interpretative notes. However, there appears to be no provision in the Draft Guidance for the CMA to consult with SMS firms on the initial version of the interpretative notes. Rather, paragraph 3.55 of the Draft Guidance states that “*it will be open to the SMS firm to take a different approach*” to that of the CMA’s. It would be more efficient and effective if the CMA were required to engage with SMS firms on the initial interpretative notes in the first place. SMS firms have the best understanding of their systems and should feed into the initial draft of the interpretative notes. In addition, this approach would provide greater certainty for all parties, as it would be less likely that the SMS firms would need to deviate from the interpretative notes.

## Chapter 4 of Draft Guidance: Pro-competition Interventions

### A. Summary of key comments

1. Pro-competition Interventions (**PCIs**) will have a fundamental impact, not only on those SMS firms who will be required to amend their business practices to comply with PCIs, but also on the businesses which rely on those firms, their competitors, and end consumers. The impact is only heightened by the fact that the CMA has the power to impose PCIs in *any* part of an SMS firm's business to address Adverse Effects on Competition (**AEC**).
2. Given the fundamental impact that these measures will have, it is imperative that the Guidance sets out clearly, and in detail, how and when the CMA will enforce these powers. The current version of the Draft Guidance lacks this clarity and detail.
3. For the reasons set out in more detail below, it is therefore critical that the CMA significantly enhances the PCI chapter in the Draft Guidance, in particular to provide: (a) clarity on the application of the AEC test when considering PCIs; (b) a clear description and framework for the procedural steps the CMA proposes to follow during the PCI process; (c) further clarity on the considerations and evidence the CMA will consider when deciding whether to impose PCIs; and (d) greater incentive for SMS firms to engage with the commitments process.
4. The Draft Guidance on PCIs lacks a clear analytical framework for applying the AEC test. While acknowledging parallels between the market investigation regime and the PCI investigations regime, it is unclear how the PCI process will align with or diverge from the market investigations regime, and the Draft Guidance does not explain the rationale for any divergence. The Guidance should clarify commonalities and areas of divergence, especially at each step of the PCI process, to provide legal certainty to all stakeholders.
5. Although the DMCC Act does not specify a theoretical benchmark for measuring an AEC in relation to PCIs, the CMA should provide clarity and legal certainty in its approach for assessing AEC through the Guidance. For the avoidance of doubt, this would not involve introducing any quasi-legislative tests but, like the equivalent guidance in the CMA's markets regime, would set out how the CMA proposes to approach a critical part of the PCI process in a transparent manner, for the benefit of all parties. Furthermore, as in relation to SMS designation and CRs, the Guidance should acknowledge the relevance (or otherwise) of market definition tools to PCI investigations; notwithstanding that formal market definition may not be necessary.
6. The Draft Guidance fails to set out a clear procedure (with milestones and appropriate timelines) for relevant stakeholders to input into the PCI process. As the DMCC regime is new and untested, it is even more important to have clear guidance on process and evidence gathering (among other things) to ensure stakeholders are properly heard and the CMA has the best chance of achieving positive outcomes. That guidance should draw on the established experience of the CMA (and other concurrent regulators) in administering other regimes.
7. The Draft Guidance allows the CMA to make PCIs in any part of an SMS firm's business. To ensure fairness and encourage innovation in the UK, the Guidance should include clear safeguards on when it would consider imposing PCIs outside the relevant digital activity, otherwise the CMA risks the lack of certainty (and implied possibility of PCIs) acting as a disincentive and unnecessary constraint on innovation in non-designated parts of SMS firms' businesses.
8. The stringent requirements imposed on SMS firms relating to commitments (for example on the timing of when they can be offered, and the lengthy and involved process for the CMA's consideration of them, given the CMA can choose to reject them even at a very late stage) may deter firms from offering them. The CMA should remain open to commitments at any stage of the process if they effectively address the issue, especially since the current PCI investigation procedure does not provide a clear early engagement step relating to commitments. In addition, the CMA should be open to varying commitments to allow for reasonable adjustments, as this will ensure that the commitment is achieving its stated aim. This provides



the best chance for the commitments process to represent a viable alternative redress mechanism that avoids the need for extensive and protractive PCI processes that waste the CMA's and SMS firms' resources.

## B. Analytical approach to assessing whether there is an adverse effect on competition

### a) Lack of analytical framework for applying the AEC test or any benchmark for its assessment, and rejection of existing analytical tools

9. The substantive test for imposing PCIs is whether there are factors relating to a digital activity which are having an AEC. However, the Draft Guidance does not contain an analytical framework for applying the AEC test.
10. In paragraph 4.3 of the Draft Guidance, the CMA explicitly acknowledges that there are “*some parallels*” between the CMA’s market investigation regime and the DMCC regime, and the use of the AEC test in this context. However, the Draft Guidance also states that there are “*differences between the legal tests and procedures*”, and that while approaches under both regimes may be similar, “*there will also be areas of divergence*”. This is extremely vague and unhelpful. Although a certain degree of flexibility is required in a new regime, the Guidance should explain, in relation to each step of the PCI process, where there are relevant commonalities or lessons learnt from the market investigations regime. In addition, the Guidance should specify where it envisages any divergence in practice and explain the reasoning for that.
11. Paragraph 4.10 states that the DMCC Act “*does not specify a theoretical benchmark against which to measure an AEC*”. The absence of a statutory benchmark should not preclude the CMA from providing clarity and legal certainty on its approach, as the purpose of guidance is to clarify how the legislation will be applied in practice. As the CMA notes in the [Guidelines for market investigations: Their role, procedures, assessment and remedies \(Market Investigations Guidelines\)](#) (paragraph 320), in the absence of a statutory benchmark to measure AEC, the Competition Commission defines such a benchmark as a well-functioning market (i.e., one that displays the beneficial aspects of competition but not an idealised perfectly competitive market). There is no clear reason why a departure from this approach is warranted, especially given that it comes at the expense of providing relevant stakeholders with a clear understanding of how the CMA intends to approach substantive PCI assessment. While paragraph 4.11 of the Draft Guidance seems to recognise this approach, the text should be amended to state this explicitly to provide greater legal certainty.
12. The lack of analytical framework is further compounded by the fact that the CMA appears to have rejected the potential application of market definition when conducting PCI investigations.<sup>11</sup> Market definition is an existing and well-established analytical tool used in competition law assessments. Whilst a formal market definition exercise may not be required, it seems unreasonable to dismiss its use in its entirety, particularly when testing constraint, customer behaviour and substitution which are relevant to assessing the need for a PCI.

### b) Lack of clarity on what evidence will be taken into account when assessing an AEC/considering PCIs

13. While the Draft Guidance provides some guidance on the factors the CMA will consider when assessing an AEC, it fails to set out the evidence the CMA will rely on when considering these factors.
14. For example, paragraph 4.12 purports to outline the factors relevant to assessing an AEC within the context of digital activities. However, there are notable issues:
  - 14.1. The listed factors are not confined solely to relevant digital activities or the UK market, despite the fact that the DMCC regime is intended to tackle effects on competition which may give rise to harm to UK businesses and consumers and that the DMCC Act provides that the digital activity under investigation must be linked to the UK.

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<sup>11</sup> See paragraph 4.9 of the Draft Guidance.

- 14.2. It remains unclear how the factors identified specifically reflect a restriction or distortion of competition.
15. To address this, the CMA should take learnings from its market investigation regime, which already identifies potential theories of harm (albeit as a non-exhaustive list), and include them in the Guidance. Providing clarity on the application of these well-understood concepts would benefit all stakeholders. We understand that it is difficult to provide potential theories of harm that capture all nuances of a regime intended to apply across very different firms, but illustrative examples are helpful and do not remove the CMA's ability to consider theories of harm on a case-by-case basis.
16. Further, paragraph 4.12(a) of the Draft Guidance states that one factor relevant to assessing whether there is an AEC is whether SMS firms' profits reflect a reasonable rate of return based on the nature of competition. This factor is not a useful or insightful metric in considering whether there is an AEC. In particular:
- 16.1. In the Market Investigations Guidelines, profitability is considered as one of the outcomes of competitive processes within a market in the context of an AEC assessment. It is, however, acknowledged that a finding that profitability is high in a market does not on its own provide conclusive evidence that the market could be more competitive, nor is it a cause of competitive harm (paragraph 126). It is especially unlikely that the profitability of one firm in isolation would have such an effect – in market investigations, the CMA is considering the profitability of *"firms representing a substantial portion of the market"* in the round (paragraph 118 of the Market Investigations Guidelines). The Draft Guidance fails to recognise these limitations.
- 16.2. Moreover, the challenges of distinguishing *"reasonable"* from *"excessive"* profits have been starkly highlighted in the long-running and complex pharmaceutical cases recently pursued by the CMA under CA98. For example, in the *Phenytoin* case, the CAT criticised the CMA's determination of the *"reasonable"* rate of return on the basis of a *"Cost Plus"* approach, finding that it was designed to establish a benchmark of perfect or *"idealised"* competition, and not *"normal"* competitive conditions. In its remittal decision, the CMA acknowledged the uncertainties inherent within such an assessment, including that *"the identification of a reasonable rate of return is not a matter of 'precise mathematics'"*, and that it is a *"question of judgement and appreciation on which experts may well take differing views"*.<sup>12</sup> The CMA's Cost Plus assessment was again challenged in the CAT by the parties in the *Liothyronine tablets* case, although the CAT concluded that there were no material errors in the CMA's methodology in this instance. These cases show that this analysis is will not yield meaningful or determinative results, and it is undesirable to bring a concept which is so uncertain and susceptible to challenge into the AEC assessment, particularly when the CMA is subject to a nine-month statutory deadline for PCI investigations.
17. For the reasons given above, the CMA should remove the reasonable rate of return indicator from the final Guidance.
18. If despite the above, the CMA decides to include this factor in its final Guidance, additional clarity and safeguards regarding what constitutes a *"reasonable rate of return"* (as found under the abuse of dominance regime) is essential, including how this relates to the consideration under the Market Investigations Guidelines as to whether profitability exceeds cost of capital over a sustained period. Without such guidance, there is a risk of unintended consequences and potentially stifling innovation in the UK. It should also be made clear in the Guidance that a consideration of this indicator alone cannot in and of itself lead to the finding of an AEC, and that it needs to be considered in the wider context of the CMA's overall assessment of the market.

### C. Analytical approach to designing PCIs

- a) Innovation and fairness should be considered when identifying effective remedies

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<sup>12</sup> [Decision – Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK, Case 50908](#), paragraph 4.21.

19. In paragraph 4.16 of the Draft Guidance, the CMA states that it “*may make a PCI in any part of an SMS firm’s business*”. However, to ensure fairness and protect an SMS firm’s legitimate interests, the Guidance should establish clear safeguards. Specifically, the PCIs should primarily focus on the relevant digital activity undertaken by the SMS firm (i.e., for which it is designated as a SMS firm). Consideration of remedies in respect of other parts of the SMS firm’s business should be reserved for specific and limited circumstances only, for example where this is essential to ensure a PCI has the desired effect on the relevant designated activity. This approach would strike the appropriate balance between promoting competition and avoiding unintended consequences that could stifle innovation in the UK.
20. In addition, the Guidance should include a presumption that where the CMA has previously imposed a CR which will or may impact an AEC, then the CMA will not impose additional remedies for a period of time to allow the CR to take effect. Without these safeguards, there is risk of duplicative processes and regulatory actions aimed at the same issue, which may undermine the effectiveness of the first CR and is likely to waste the resources of both the CMA and the SMS firm to remedy issues which are already in the process of being addressed.
21. The CMA has a broad choice of remedies, including divestment (as set out in paragraph 4.25 of the Draft Guidance). Unlike the UK’s merger control regime, the DMCC Act provides the CMA with extensive monitoring powers which will enable it to have effective oversight of behavioural remedies, to ensure they are delivering on their stated aims. This should mean that divestment should not be necessary except in specific and limited circumstances. The CMA should make clear in the Guidance that whilst it theoretically has the power to order divestment, the CMA will consider behavioural remedies first, before considering whether divestment may be necessary. The CMA should expressly acknowledge that it only intends to consider divestment in specific and limited circumstances.
22. Paragraph 4.37 of the Draft Guidance states that the CMA may consider user or customer benefits when assessing whether to make a PCI and when designing the PCI itself. In addition, paragraph 4.40 provides that SMS firms and third parties will have the opportunity to present relevant evidence regarding these benefits. However, to enhance clarity, the Guidance provide further details on the CMA’s approach to efficiency assessments and include explicit guidance on countervailing factors, such as imminent market entry or expansion and countervailing buyer power, as it does in other guidance such as the [Merger Assessment Guidelines](#) (see section 8).

#### D. Procedure for PCI investigations

##### a) Lack of procedural guidance / timetable for investigations

23. As with other parts of the Draft Guidance, the PCI section does not provide a detailed process setting out how the CMA will conduct a PCI investigation, nor does it contain an indicative timetable for the steps involved, including (critically) the timing for the proposed decision. In particular, there are no steps outlined between the initial invitation to comment (set out in paragraph 4.54) and the publication of the proposed decision (set out in paragraph 4.55). Given that this phase constitutes a crucial part of the nine-month PCI investigation, this is a significant and unacceptable omission.
24. Whilst we appreciate the DMCC regime is new and the CMA may want to provide itself with a certain degree of flexibility, if anything, the novelty of the regime means that it is even more important to have clear guidance on process to ensure stakeholders are heard and the CMA has the best chance of achieving positive outcomes. That guidance should draw on the established experience of the CMA (and other concurrent regulators) in administering other regimes (e.g., mergers/market investigations) which set out a clear and detailed timetable for the different stages of an investigation.
25. A clear and transparent process is necessary to enable all stakeholders to understand what is expected at each stage. This will ensure a truly participative process and guard against unintended oversights. This is particularly important given that the Draft Guidance currently states that the CMA is unlikely to accept commitments offered late in the process, therefore lack of effective early engagement could undermine this process.

26. There is no reason why a more detailed timetable could not be included in the Draft Guidance. The CMA should therefore amend the Draft Guidance so that it includes a comprehensive process with an indicative timetable for how the CMA will approach the nine-month PCI investigation, with key milestones for engagement with the relevant SMS firm and other interested parties reflecting the steps outlined in the Draft Guidance. In addition, the timetable should provide sufficient opportunities for genuine engagement both before and after the CMA publishes its proposed PCI decision.
27. At a minimum, any PCI investigation should cover the steps detailed below and the Guidance needs to contain a workable timetable to accommodate these steps. As these process steps are all possible in a 24-week Phase 2 merger review, they should also be able to be accommodated in respect of the DMCC regime. At present, paragraph 4.56 provides that the CMA will “typically” offer the SMS firm the opportunity to make oral representations in respect of the proposed decisions. Given the high stakes involved for SMS firms, this is not sufficient. The Draft Guidance should be amended so that there is a concrete obligation on the part of the CMA to provide the opportunity to make oral representations in order to avoid prejudicing a firm’s rights of defence, and this is reflected in the inclusion of an oral hearing as a definitive step in Stage 4 of the timetable below.

Milestone	Timetable
<b>Stage 1: Launch of PCI investigation</b>	
CMA issues PCI investigation notice	Day 1
<b>Stage 2: Initial information gathering</b>	
CMA publishes Invitation to Comment (setting out the scope of the investigation, areas of concern and (where appropriate) potential remedies)	Month 1
CMA issues information requests (to the SMS firm and relevant third parties) and holds bilateral meetings where appropriate	Months 1 to 3
Update calls with potential SMS firms	Throughout, at least on a monthly basis
<b>Stage 3: Preparation and publication of interim findings</b>	
CMA publishes interim findings for consultation (setting out initial views on concerns to be addressed and potential PCIs)	Month 4
State of play meeting	Month 4
Final deadline for all parties’ (including third party) submissions before the proposed decision	Month 5
<b>Stage 4: Preparation and publication of proposed decision</b>	
CMA publishes proposed decision for public consultation	Month 6
Consideration of responses to proposed decision and oral hearing	Months 7-8
Final deadline for potential SMS firm’s submissions before the decision	Months 8-9
<b>Stage 5: Decision</b>	

Milestone	Timetable
CMA publishes PCI decision notice	Month 9
<b>Stage 6: Implementation</b>	
Testing or trialling of potential remedies (where appropriate)	Months 9-13
PCIs come into effect	Months 9-13

b) Where the Draft Guidance does set out procedure, it is unlikely to achieve the right outcomes

28. Where the Draft Guidance does set out specific procedure, it is unlikely to achieve the right outcomes. For example:

28.1. Paragraphs 4.51 and 4.52 of the Draft Guidance explain that, given the short timeframes for a PCI investigation, the CMA is likely to need to consider potential remedies at the outset. However, to engage effectively on remedies, it is necessary to fully understand the relevant concern. This is not possible at the outset, and engaging early and publicly on potential remedies (as set out in paragraph 4.54) risks presupposing the outcome and prejudicing a firm’s rights of defence. A clear procedure would assist parties in understanding the CMA’s concerns and considering appropriate remedies as early as possible;

28.2. Paragraph 4.63 of the Draft Guidance envisages the CMA publicly consulting SMS firms on remedies “*potentially in advance of the public consultation*”. However, the Draft Guidance should be amended to provide an explicit obligation on the CMA to consult SMS firms on proposed remedies before engaging in broader discussions. We understand that the CMA will be concerned to ensure that all relevant stakeholders get an equal opportunity to engage, and we agree with this. However, it will also be important to ensure that the process is designed to be efficient and effective;

28.3. The SMS firm that will ultimately be the subject of the remedy in question, will inevitably be best-placed to suggest / discuss remedies with the CMA that are actually feasible to implement and to advise the CMA on what the consequences of particular remedies are likely to be, and therefore it is logical that the CMA consult with them first, so that other stakeholders are presented with a clear and considered package that could be implemented effectively. This would not prevent those stakeholders from raising points to the effect that the remedies do not go far enough or from suggesting alternatives, but the overall process would be much more efficient and effective if those stakeholders are given proposals for remedies which can be implemented and where the likely effects are understood and can be explained; and

28.4. Paragraph 4.67 of the Draft Guidance notes that when considering whether to impose requirements on a trial basis the CMA will consider the expected value of the proposed test or trial and sets out the meaning of value, feasibility, and proportionality. However, notably absent from the proportionality criteria is any reference to the impact on customers and competition. This omission is significant given that: these tests have the potential to be highly disruptive to SMS firms, businesses that rely on SMS firms, and their respective end-consumers; and that these tests carry a high risk of unintended and adverse consequences which could be detrimental to competition, innovation and investment in the UK digital landscape as a whole. The Draft Guidance should be amended to include this.

c) The commitments provisions are overly onerous and will disincentivise use of this process

29. Paragraphs 4.82 to 4.84 of the Draft Guidance allow the CMA to accept commitments in relation to all or part of the AEC, at its discretion. The potential benefits of commitments are significant, including that they could enable swifter, more effective, and more efficient remedies, mitigation or prevention of AECs.

However, the requirements on SMS firms are overly onerous and are likely to discourage firms from offering them. For example:

- 29.1. Paragraph 4.92 currently states that the CMA is unlikely to accept commitments at a late stage. However, it is crucial that the CMA recognises that timely resolution of competition concerns benefits all parties involved. This paragraph should, therefore, be amended to emphasise that, if a commitment effectively addresses the concern, the CMA should be open to considering it, regardless of the stage in the investigation. This is particularly the case given that the PCI investigations procedure, as outlined in the Draft Guidance, lacks a clear step for SMS firms to engage with the CMA on possible commitments early on;
- 29.2. Paragraph 4.90 lists relevant factors for accepting proposed commitments and includes “*an offer to appoint a Monitoring Trustee to oversee compliance by the SMS firm with the commitment*”. As the CMA will have very extensive monitoring powers under the DMCC Act, this requirement seems redundant. The CMA should avoid imposing additional burdens on the parties other than in specific and limited circumstances; and
- 29.3. Paragraph 4.86 currently prohibits the variation of commitments once accepted. In practice, this means that the CMA might “*need a more extensive remedy*” than if the CMA were to impose a PCI. However, this high bar and rigidity may discourage firms from proposing commitments. To avoid this, paragraph 4.86 should be amended to allow for reasonable variations if circumstances change or if a more effective remedy emerges. This flexibility is likely to lead to quicker resolution, benefiting both the CMA and firms while avoiding unnecessary resource expenditure.

## Chapter 5 of Draft Guidance: Investigatory Powers

### A. Summary of key comments

1. The CMA's investigatory powers under the DMCC Act are very broad and, in many respects, greater than those available to the CMA (or other concurrent and international regulators) in other regimes. This is particularly the case in respect of the CMA's information gathering powers, and the powers to require businesses to vary their usual conduct or perform a specified demonstration or test ("*varying and testing powers*"). Without appropriate limitations on their use, the varying and testing powers have the potential to require potential or designated SMS firms and/or third parties to spend significant time and resources conducting tests (including live tests on end-consumers) or to drastically vary their usual business practices at the sole discretion of the CMA, in circumstances where the risk of unintended or adverse consequences (particularly for businesses reliant on these firms or their end-consumers) is inevitably extremely high.
2. Accordingly, it is imperative that the Guidance sets out clear guardrails on the specific and limited circumstances in which the CMA will exercise its varying and testing powers, and how it will ensure appropriate engagement with both SMS firms and/or third parties (who may have fewer resources to respond than an SMS firm) in relation to the necessity, design, and operation of any required variations or testing. Without these guardrails, there is a real risk that the varying and testing powers could lead to broader negative effects on competition, innovation and investment in the UK. At a minimum, the Draft Guidance should therefore be updated to reflect that these powers are most appropriately exercised only in relation to firms already designated as having SMS; in relation to the relevant designated activity; and when other information powers have proved insufficient.
3. In relation to those broader information gathering powers, the Draft Guidance acknowledges the potential for information requests to be burdensome on recipients, but this should be expanded to provide details of how, in practice, this will be balanced against the value of obtaining the relevant information. The Guidance should also explicitly require the CMA to consider the extent to which each request is proportionate and feasible. On proportionality, the Guidance should make clear that, except in very limited and specific circumstances, the CMA will only request information from SMS firms in relation to the relevant digital activity in which that firm has been designated as having SMS, rather than pursuing information on other digital activities or other parts of that firm's business.
4. At present, the Draft Guidance contains insufficient safeguards for the protection of a party's confidential information which runs the risk of compromising the willingness of relevant parties to engage openly with the CMA throughout its processes. The Guidance should be brought into line with other regimes which have more robust processes in place.

### B. Investigatory powers

- a) Lack of guidance on potential to require testing / varying of normal conduct
5. Paragraphs 5.10 to 5.15 of the Draft Guidance outline the CMA's new varying and testing powers. These are extremely interventionist powers which can be imposed on any party, and go beyond those available to the CMA in other regimes, as well as powers granted to other authorities in the digital context (such as the European Commission under the Digital Markets Act). The exercise of these powers has the potential to be highly disruptive to SMS firms, businesses that rely on SMS firms, and their respective end-consumers, and carries a high risk of unintended and adverse consequences which could be detrimental to competition, innovation and investment in the UK digital landscape as a whole.
6. Despite these risks, and the fact that the varying and testing powers were introduced into the DMCC Bill only in the latter stages of the legislative process, and were therefore subject to less scrutiny and debate, the Draft Guidance does not contain any guardrails or limits as to when the CMA will exercise these powers. In fact, paragraph 5.11 provides that the CMA can use its powers for any "*purpose of information gathering across its digital markets functions*". This is limited only by paragraph 5.14 which requires the CMA to consider the feasibility, value and proportionality of any testing. This is not sufficient in circumstances where there is a real and genuine risk of adverse consequences for firms and their customers from conducting "live" tests. Rather than listing out three non-exhaustive examples at paragraph 5.11(a)-(c) of

when the CMA may rely on the varying or testing powers, the CMA should instead set out clear guidance as to the specific and limited circumstances in which it may seek to use these powers.

7. That guidance should include provisions that:
  - 7.1. The powers should be used only in specific and limited circumstances, when other tools are insufficient. In particular, the CMA already has extensive powers to request, gather and require firms to generate information. For algorithms especially, it will be able to request all underlying code, gain access to any A/B tests conducted by SMS firms, and any internal documents explaining why the algorithm was designed in a certain way, or the outcomes it seeks to achieve and ask questions (both in person and in writing) on any of these points. It should only be where these powers are insufficient to enable the CMA to acquire a sufficient level of understanding on a particular topic, that it should consider using its varying and testing powers.
  - 7.2. SMS firms should be consulted on the nature of the test and feed into its design. SMS firms are best-placed to assist the CMA in this regard given their knowledge of their own systems and customers. This requirement would help tease out and address practical issues which are likely to arise and which would impact the CMA's assessment of feasibility, value and proportionality of any testing. For example, it typically takes several months to design and implement a beta test, and several weeks to collect enough data to have meaningful results. Moreover, these tests have significant limitations, especially with respect to understanding long-run consumer behaviour or understanding how third parties impacted by the factor being tested may respond. Most tests of any significance also require bespoke and manual deep dives to fully understand the results. All of these factors should be taken into account when considering the feasibility, value and proportionality of any testing.
  - 7.3. When considering the proportionality of any testing, the CMA must consider the potential impact on SMS firms' customers, competitors and end-consumers.
  - 7.4. The CMA will set out, at the start of a test, outcomes of the test that would trigger competition concerns and those that would not, and the reasons for this assessment. This requirement will ensure that the CMA has carefully considered the usefulness of a given test in establishing or dismissing competition concerns.
8. There is a disconnect between the CMA's new varying and testing powers in this context compared to its approach to investigatory powers in the PCI chapter of the Draft Guidance. For example:
  - 8.1. Paragraph 4.36 of the Draft Guidance notes that the CMA will encourage SMS firms to engage on PCI options as early as possible and identify those they consider most appropriate and/or least onerous on them while explaining why they would be effective in addressing the AEC. The CMA should, at a minimum, include similar wording in relation to its powers to require a party to perform a specified demonstration or test (as set out in paragraph 5.10); and
  - 8.2. Paragraph 4.67 of the Draft Guidance provides considerably more detail on the criteria that the CMA will consider when assessing whether to impose requirements on a trial basis within a PCO than in respect of the CMA's new varying and testing powers. The criteria in paragraph 5.14 should be supplemented to include a similar level of detail, with paragraph 5.14(c) amended to reflect the comments on proportionality as per paragraph 28.4 above.
- b) Lack of explicit guardrails on use of investigatory powers
9. Paragraph 5.4 of the Draft Guidance allows the CMA to send information notices to "any person". The CMA should:
  - 9.1. recognise in the Guidance, in line with the approach taken in [Mergers: Guidance on the CMA's jurisdiction and procedure](#), that third parties may have commercial incentives to raise concerns; and



- 9.2. explicitly state that as a consequence of this, the CMA will always scrutinise any views submitted by third parties carefully and consider the available evidence, such as internal documents prepared in the ordinary course of business, to support these views.<sup>13</sup>
10. The CMA's powers to require information under the Draft Guidance are extensive. Paragraph 5.8 of the Draft Guidance enables the CMA to require a firm to create, gather, aggregate or combine specific financial information in a way which may be different from the firm's existing internal practices. Depending on the request, this could impose a significant and disproportionate burden on the firm and / or the request may not be feasible. For example, paragraph 5.9 of the Draft Guidance enables the CMA to require a firm to obtain or generate information as to how its algorithmic code has changed over time. This assumes that firms have records of this information in some form, which may not always be the case.
11. Paragraph 5.16 of the Draft Guidance acknowledges the impact that information requests will impose on recipients and provides that the CMA will strive to avoid imposing an unnecessary burden while also considering its need to operate efficiently and effectively – however, this is focused on the impact on "*smaller firms or consumer organisations*". This paragraph should be amended to clarify that the CMA will strive to avoid imposing unnecessary burdens on *all* information notice recipients, including SMS firms, and not just smaller firms and consumer organisations.
12. Paragraph 5.17 outlines some of the steps that will be taken in order to minimise this burden, including giving recipients of information requests advance notice so that they can manage their resources, and sending an information notice in draft for discussions with the party. As presently drafted, the CMA has a wide discretion not to take these steps. For example, it will give the aforementioned advance notice "*in appropriate cases*" (with no indication of when it might not be appropriate to do so), and an information notice will be sent in draft form "*in certain circumstances, where it is practicable and appropriate to do so*" (again with no indication of when this might not be the case). These steps are imperative to ensuring proportionality, feasibility and efficiency, and the Draft Guidance should be amended to make these more definitive obligations on the CMA to liaise with the intended recipient. For example, the Guidance should provide that the CMA will give advance notice and share a draft of each request for discussion with the party in all but specific and limited circumstances. This collaborative approach would lead to more efficient and effective outcomes, and would be in line with the approach adopted by the CMA in relation to requests for information in both its conduct and merger control investigations, and by other regulators, including Ofcom. Again, the Guidance should confirm that paragraph 5.17 also applies to SMS firms, and not just to smaller firms and consumer organisations.
- c) Lack of safeguards in relation to powers of access
13. Paragraph 5.22 of the Draft Guidance states that where an SMS firm or a firm that is the subject of a breach investigation has not complied with the requirements of an information notice, the CMA may also exercise its power of access, its power to interview, and its power of entry as described in paragraphs 5.29 to 5.63. The CMA should explicitly state in the Guidance that before taking a decision to exercise these powers it will first engage with the firm to seek to understand why it has not complied with the requirements, and consider the extent to which the exercise of these powers is necessary and proportionate in that context, and/or whether the exercise of an alternative power (for example a further information notice with shorter timeframes for response) may be used instead.
- d) Imprecise and uncertain expectations which lead to unrealistic burdens which are not workable in practice
14. In the context of the legal duty to preserve evidence which is relevant to a digital markets investigation, paragraph 5.75 of the Draft Guidance refers to a person knowing or suspecting that a breach or PCI investigation is being, or is likely to be, carried out. Whilst the Draft Guidance attempts to clarify when a person will be found to have this knowledge or suspicion, the wording is imprecise and creates a high level of risk and uncertainty, which in turn creates an unreasonably high and unrealistic burden which is not workable in practice. For example:

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<sup>13</sup> See paragraph 9.14 of the Draft Guidance.

- 14.1. Paragraph 5.78 provides that the CMA will “typically” consider a person to know that one of the circumstances listed in paragraph 5.75 is applicable if it has “received information through any other forum indicating that one of the circumstances may apply” (as well as if the CMA has delivered any form of notification). Use of the word “typically” suggests that the CMA has the discretion to find or impute knowledge in scenarios not envisaged in paragraph 5.78, and this creates uncertainty. Paragraph 5.78 should therefore be amended to limit the CMA to finding or imputing knowledge only in the scenarios listed therein (even if this means that these scenarios need to be expanded upon). The reference to “any other forum” is extremely broad, especially as there only needs to be an “indication” that one of the circumstances “may” apply, which sets a very low bar for knowledge. Further guidance should be provided on the other forums through which such knowledge may be obtained, and the drafting should be amended to more closely reflect this understanding of knowledge.
- 14.2. Further, paragraph 5.79 states that “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.” This is extremely broad and lacks legal certainty, particularly as there is no requirement for the person to have “actual knowledge”. The CMA should provide additional guidance and examples of when these circumstances may be considered to have arisen, whilst ensuring that it takes a proportionate approach. For example, if a regulator in another jurisdiction conducts an investigation, it would be disproportionate for the CMA to assume that any person should know about this and suspect that the CMA may conduct a similar investigation, notwithstanding potential divergences in the competitive landscape of different jurisdictions. This assumption again provides an unreasonably high and unrealistic burden on individuals which is not workable in practice.
15. As drafted, the provisions referred to above (and as made explicit in paragraph 5.80 of the Draft Guidance) mean that a person will be required to take a broad view of relevant information to be preserved as soon as they “suspect” that an investigation is likely to occur, which as set out above, is not clearly defined. Given that SMS firms generate vast amounts of information, often across multiple business lines, the majority of which will be entirely irrelevant to the CMA, it is not clear how this could ever represent an appropriate or proportionate duty. This is particularly the case as document preservation is nearly always a very expensive and onerous obligation on firms, which frequently requires the alteration of standard business practices. It is therefore imperative that the Guidance sets out clear and workable standards for when and how these obligations will apply, which do not impose unrealistic obligations on SMS firms. At the very least, the Draft Guidance should be amended to require the CMA to:
- 15.1. inform parties when it considers that the obligation to preserve information has become live (as per paragraph 5.78); and
- 15.2. provide an explanation of the duty to preserve information and the scope of that duty, rather than placing the burden entirely on firms to guess at when they might be expected to “suspect” an investigation might occur, especially in light of the presumption that routine document deletion processes will not be regarded as “reasonable” (as set out in paragraph 5.80).
- e) Lack of clarity regarding skilled persons report
16. The Draft Guidance affords the CMA considerable discretion to require a skilled person report. For example, under paragraph 5.67(b) of the Draft Guidance, the CMA can require such a report where it considers it “necessary and/or beneficial for a third party to provide an independent assessment of a particular issue”, but very little indication is given as to when this might be the case, and “beneficial” is a subjective and low threshold for the CMA to meet. Given that under paragraph 5.71 of the Draft Guidance, the CMA may require a firm to be liable for payment to a skilled person which is likely to be costly, the circumstances in which it may require a skilled person report should be tightened. The Guidance should also clarify the circumstances in which a firm would be liable for such payment.
- f) Insufficient safeguards to preserve confidentiality

17. Paragraph 5.85 of the Draft Guidance acknowledges that 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, and that it understands that how it protects and handles confidential information will be an important consideration for those who engage with the regime. Despite this, the Draft Guidance gives the CMA an overly broad discretion as to whether or not it consults with the relevant firms regarding the confidentiality of their documents, which goes beyond the more robust approach taken in other regimes where there is a clear process for the making of confidentiality claims.
18. By way of example, paragraph 5.89 provides that 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”*. In order to provide reassurance to relevant parties (which will in turn benefit the CMA as relevant parties will be more likely to feel able to engage openly with the process), further guidance should be provided on what these *“reasonable and practicable”* steps are likely to be.
19. In addition, the same paragraph provides that the CMA may choose not to provide details of the information it proposes to disclose to the business concerned, if the CMA has *“sought to protect the information to be disclosed (for example, by anonymising or aggregating data)”*. This assumes that the CMA will be able to correctly identify and protect the business’ confidential information, which may not be possible given that it may not have a detailed understanding of the business in question and the overall context of the information to that business. The paragraph also provides that the CMA only needs to have *“sought”* to have protected the information, as opposed to providing a more concrete commitment in this regard. This provides the CMA with an unduly broad discretion to disclose a party’s information without safeguarding its confidentiality, which may in turn deter relevant parties from engaging fully and openly with the CMA throughout the process. This potential justification of attempting to protect the information to be disclosed should therefore be removed from the Guidance as a reason for the CMA not to provide details of the information it proposes to disclose to the person concerned.

## Chapter 6 of Draft Guidance: Monitoring

### A. Summary of key comments

1. The monitoring provisions set out in the Draft Guidance are extensive. It is therefore critical, and consistent with the CMA's stated objective of taking a proportionate approach to implementing the new DMCC regime, that the Guidance puts in place a monitoring process that will be efficient, effective, and provides clarity and transparency as to how the CMA will undertake its monitoring functions. This is key not only for SMS firms, but for all other stakeholders, including the CMA, and to ensure that the DMCC regime does not hinder innovation with an overly burdensome approach to monitoring.
2. As currently proposed, the Draft Guidance falls substantially short of these standards, as it: (a) incorrectly frames one of the key threshold objectives of monitoring as being to "*strengthen*" competition. This goes beyond the wording of the DMCC Act and is an inappropriate threshold for a regulatory regime and risks wide-ranging, unintended consequences including on innovation and investment; (b) sets out unrealistic expectations as to the experience / role of nominated officers in circumstances where the potential consequences for that individual are very high; (c) lacks clarity on penalties and the notification of compliance concerns; and (d) provides insufficient guidance on how the CMA will review the effectiveness of competition requirements (which has potentially far-reaching consequences for SMS firms and stakeholders).
3. It is therefore vital that the Draft Guidance is amended to:
  - 3.1. focus monitoring on: (i) SMS firms' compliance; and (ii) the effectiveness of existing competition requirements rather than using monitoring powers to artificially "*strengthen*" competition;
  - 3.2. reflect the commercial realities of technology firms which have diversified and global decision-making and complex business models. The CMA should take a more pragmatic approach and not impose overly restrictive qualifications. Furthermore, while we expect SMS firms will, in line with good business practices, be receptive to feedback from their stakeholders on their conduct, the requirement on a nominated officer to consult with users of the relevant activity is not clearly explained and is overly onerous (particularly for activities with a substantial number of users);
  - 3.3. provide greater clarity on compliance reporting timelines and ensure that they are proportionate. It is overly burdensome to require stakeholders to input on compliance reporting requirements, proposed decisions and remedies simultaneously and may reduce the quality of their input;
  - 3.4. clarify when it will impose penalties for non-compliance within the Guidance instead of referring to the CMA's [Administrative Penalties: Statement of Policy on the CMA's approach](#); and
  - 3.5. provide clear guidance on how the CMA will review the effectiveness of competition requirements to provide legal certainty for SMS firms and stakeholders whose businesses could be substantially impacted by a finding that a competition requirement is not effective. As currently drafted, the Draft Guidance does not provide legal certainty or meaningful guidance.

### B. Monitoring compliance

#### a) Incorrect framing of the threshold objective of monitoring

4. Paragraph 6.4(c) of the Draft Guidance states that, alongside: (i) monitoring of SMS firms' compliance with competition requirements and appropriateness of further action (including enforcement); and (ii) monitoring the effect of existing competition requirements to determine if they are having the intended impact, a key area of monitoring is "*to assess whether evidence suggests that competition could be strengthened...*" through a new SMS investigation, new CRs or PCIs. While there is a clear rationale for

monitoring in relation to (i) and (ii), it is important that the Guidance is clear on the purpose of monitoring in relation to (iii). In particular, the objective of monitoring should not be to artificially enhance competition or seek an idealised scenario of perfect competition. Rather, the general test for intervention should centre on assessing whether competition functions effectively or to address potential harm. This is the basis for CRs (which are intended to address “existing issues” and the risk of firms taking advantage of substantial and entrenched market power (see paragraph 3.2 of the Draft Guidance)) and PCIs (which are focused on the concept of an adverse effect on competition). It would be therefore be inappropriate for the CMA’s framework for its monitoring powers to go beyond the established objective of the tools available to the CMA under the DMCC regime. Indeed, a focus on whether competition is functioning effectively or whether intervention is required to address potential harms aligns with the CMA’s acknowledgment in other parts of the Draft Guidance that comparing prevailing circumstances to an idealised scenario of perfect competition is not practical (see, for example, footnote 151). Therefore, paragraph 6.4(c) should be amended to reflect this.

b) Unrealistic expectations as to the experience / role of nominated officers

5. Paragraph 6.34 of the Draft Guidance notes that a nominated officer needs to be “a senior manager with operational responsibility for the SMS firm’s business model, product design and/or strategy in relation to the digital activity”. While this criterion reflects a legitimate aim to ensure robust oversight, it sets an unreasonably high bar and exceeds the typical expectations of a compliance role. Moreover, this definition fails to account for the intricate commercial dynamics within technology firms, which are often characterised by atomised, fast-paced decision-making and complex business models.
6. Instead of imposing overly prescriptive qualifications, the CMA should take a more pragmatic approach. Otherwise, SMS firms may struggle to appoint somebody who can effectively meet the criteria outlined in the current Draft Guidance and adhere to the standards expected by the CMA, while continuing to maintain the operational responsibility required by the CMA. The Guidance should recognise that identifying an officer within the parameters set out therein may be difficult and therefore the CMA will welcome engagement with SMS firms in this regard.
7. This issue is compounded by the fact that, unlike other comparable digital regimes, the DMCC Act imposes a significant burden on an individual, nominated officer, who can be subject to individual penalties if the SMS firm fails to comply with the competition requirements. For example, in the EU, it is the undertaking/gatekeeper that is solely liable for its compliance with the obligations under the DMA.<sup>14</sup> Whilst the DMA requires gatekeepers to establish a dedicated DMA compliance function,<sup>15</sup> the management body of the gatekeeper is required to monitor compliance with the DMA.
8. Paragraph 6.38(d) of the Draft Guidance suggests the role of a nominated officer is to engage with stakeholders “including users of the relevant activity” on compliance. However, this requirement is overly onerous on the nominated officer, particularly for activities with a substantial number of users. In addition, it is not clear why the nominated officer must actively test compliance with stakeholders, especially considering the broad powers vested in the CMA. As such, paragraph 6.38(d) should be deleted or, at the very least, limited to requiring the SMS firm (rather than the nominated officer) to engage with stakeholders. However, in that case, the CMA should set out clear guidance on when, and why, it considers this would be necessary and proportionate and outline how such engagement should be undertaken. The criteria of value, feasibility, and proportionality as per paragraphs 4.67 and 5.14 of the Draft Guidance would also be relevant in this respect.

c) Overly bureaucratic and administratively detailed approach to monitoring

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<sup>14</sup> See Articles 30 and 31.

<sup>15</sup> See Article 28.

9. Paragraph 6.46 of the Draft Guidance notes that the CMA will consult on the substance of compliance reporting obligations, either concurrently with proposed remedies or separately. However, considering the CMA's existing commitment to consult on proposed decisions and remedies simultaneously, extending consultation to reporting requirements risks overwhelming stakeholders. Too many questions at once are likely to reduce the quality of responses or disincentivise responses altogether.
10. Further, the rationale for consulting relevant stakeholders (including users) on reporting requirements is unclear and contrary to the CMA's stated aim of taking a proportionate approach to implementing the new DMCC regime. As the CMA would have already engaged with these stakeholders during the remedies process to gather their views on potential concerns and remedies, a more focused approach is warranted. Specifically, the CMA should limit its consultation on reporting requirements to the SMS firms directly affected by the obligation.
11. Paragraph 6.40 of the Draft Guidance leaves compliance reporting timelines open. The Guidance should provide for an annual reporting cycle to clarify expectations.<sup>16</sup> If the CMA considers that more onerous obligations should be imposed, it should be required to ensure that it adopts a proportionate approach and not impose overburdensome obligations on SMS firms. The preparation of reports inevitably takes time, and detracts from SMS firms' ability to progress initiatives and innovate, to the detriment of all parties and ultimately the economy. Therefore, reporting should be limited to what is strictly necessary for effective compliance monitoring.
12. Paragraph 6.60(c) of the Draft Guidance states that the CMA may require SMS firms to consult with affected stakeholders before accepting voluntary undertakings. However, the Draft Guidance lacks clarity on the practical aspects of these consultations including how they should be conducted and when the CMA would impose such a requirement. Experience in other digital regimes suggests that public workshops are unlikely to be the most helpful forum given that firms are inevitably constrained in their ability to engage openly, for example, because of the need to preserve confidentiality. Therefore, the CMA should provide specific guidance on effective consultation methods to ensure meaningful engagement.

d) Lack of clarity on penalties and notification of compliance concerns

13. Paragraph 6.55 of the Draft Guidance states that the CMA may impose penalties on the 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"*. The CMA should amend the Draft Guidance to explain and clarify when it will impose penalties and include some non-exhaustive examples of what reasonable excuses might be.<sup>17</sup> Whilst SMS firms will endeavour to submit reports on time, situations may arise where many reporting requirements and/or the collation of information required by the CMA necessitate substantial resources and time. The Guidance must explicitly state that the CMA will reserve penalties for cases where the SMS firm and/or nominated officer genuinely neglect their reporting obligations. Moreover, as set out above, the DMCC Act imposes a significant burden on nominated officers and the Guidance should ensure that they can exercise their rights of defence.

C. Monitoring effectiveness

a) Lack of clarity on the CMA's review of effectiveness

14. Paragraphs 6.73 and 6.74 of the Draft Guidance aim to set out the CMA's approach to reviewing the effectiveness of competition requirements. However, these paragraphs lack legal certainty and do not provide meaningful guidance. For example, paragraph 6.74 states that there may not be a direct correlation between changes in competitive conditions and competition requirements but rather the CMA will assess

<sup>16</sup> By comparison, Article 11 of the [DMA](#) clarifies that gatekeepers must submit a compliance report annually.

<sup>17</sup> We note that footnote 366 in the Draft Guidance states that the CMA intends to consult on an updated version of this guidance, which will set out the CMA's approach to penalties for breaches of certain of the DMCC Act's digital markets provisions. As this has not yet been published, we reserve our right to provide further feedback on the CMA's approach in relation to penalties.

the evidence *“in the round”* to determine whether a competition requirement has been effective. Given the potential consequences for stakeholders, the CMA should provide clear and transparent guidance. This is particularly the case given that currently the Draft Guidance goes beyond the wording of the DMCC Act and envisions that monitoring will encompass efforts to *“strengthen”* competition. For example, the CMA should explicitly state that it will assess its concerns and evaluate whether the implementation of competition requirements has indeed made a difference, considering the factors outlined in paragraph 6.74.

15. In terms of effectiveness, the CMA should acknowledge that remedies can take time to become effective and that the competition requirements imposed on SMS firms are unlikely to produce immediate results. The CMA should, therefore, provide additional guidance on assessing effectiveness over certain periods of time. In addition, the CMA should acknowledge that effectiveness may require the CMA to reconsider if there was an initial issue, and revisit an SMS firm’s submissions if necessary.
16. Paragraph 6.67 of the Draft Guidance notes that the CMA may consult on metrics, including *“data on user numbers for a given product/activity”* when reviewing the effectiveness of competition requirements. However, the relevance of user numbers as a success metric is unclear. While it serves as an example, it raises fundamental questions about the CMA's objectives under the DMCC regime. Effective competition and positive consumer outcomes do not necessarily correlate with SMS firms becoming smaller. The CMA should explain when user numbers would be a dispositive metric. In addition, the level of detailed guidance and proposed consultation on monitoring metrics contrast with the ambiguity surrounding the evidence the CMA will consider during SMS designations and the imposition of competition requirements.

## Chapter 7 of Draft Guidance: Enforcement of competition requirements

### A. Summary of key comments

1. Competition requirement investigations can ultimately lead to the CMA finding that the firm has breached a CR or other competition requirement, which can in turn lead to financial penalties, reputational damage, and the firm being made subject to burdensome orders which place restrictions on future conduct. As such, it is of vital importance that these investigations are carried out in accordance with a clear, consistent and transparent procedural framework so that firms know what to expect at every stage of the process. It is also key that firms under investigation are given sufficient opportunity to effectively exercise their rights (including their rights of defence), which means providing guaranteed opportunities for engagement throughout the process. The Draft Guidance fails to achieve this. In particular:
  - 1.1. The Draft Guidance fails to provide sufficient certainty and there is a lack of consistency in the differing approach in relation to investigations into breaches of CRs compared to other competition requirements. While it is true that the DMCC Act is more prescriptive in relation to enforcement of CRs, there is no reason why investigations into potential breaches of CRs should be treated differently (not least because the potential consequences for SMS firms from breaches of competition requirements are equally severe). The CMA should adopt a consistent framework for competition enforcement in the Guidance, which would simplify matters, avoid confusion, and allow the CMA to develop a consistent practice across all investigations.
  - 1.2. The Draft Guidance lacks a procedural framework or indicative timetable for the key steps involved in investigations into suspected breaches of competition requirements – it should be amended to provide this. The same also applies for the processes and procedures that apply only to the enforcement of CRs.
  - 1.3. The CMA retains an inappropriate level of discretion in determining whether and how key elements of the investigation process will occur. In some cases, this discretion should be removed altogether in the interests of procedural certainty on critical issues, and in others, the Guidance should provide further detail as to how that discretion will be exercised by the CMA.
  - 1.4. The Draft Guidance affords the CMA considerable discretion over the ability of firms to engage throughout the investigation process. In many cases, the expected timing for that engagement (including when in the process it will occur, and how long that opportunity will be available for) is left to be determined by the CMA on a case-by-case basis. The Draft Guidance should be supplemented with minimum periods so that firms are guaranteed sufficient opportunities for meaningful engagement, as well as more definitive timings for when during the investigation that opportunity will be provided.
  - 1.5. The CMA also reserves the right not to offer any opportunities for engagement (at all) to a firm in certain cases. Given the serious consequences of enforcement action on firms, it is wholly inappropriate that firms do not have guaranteed and sufficient rights to engage with the CMA on potential outcomes arising from those processes/decisions (e.g., it is inappropriate for firms not to have a guaranteed right to make oral representations on the CMA's provisional findings). As above, in some cases, this discretion must be removed altogether (i.e., engagement should be mandatory), and in others, the Guidance must provide further detail as to how the discretion will be exercised by the CMA.
2. There is a distinct lack of guidance on when the countervailing benefits exemption (**CBE**) will apply, which risks firms being unable to effectively address the CMA's concerns. This is compounded by the Draft Guidance imposing firm conditions which go beyond the legislative text, including, for example, a requirement for the firm to 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. Given that that this is a statutory test which is not left to the discretion of the CMA, it is inappropriate that the Draft



Guidance imposes a higher threshold on the firm in question, and this should be amended to reflect the underlying legislation.

3. For the avoidance of doubt, where the section on commitments in the context of conduct investigations (paragraphs 7.74 to 7.90) cross-refers to the guidance given on commitments in the context of PCIs (paragraph 4.82 to 4.111), we reiterate our comments made in respect of the latter where relevant.

## B. Breaches of competition requirements

### a) Lack of a procedural framework and timetable for investigations, and inappropriate level of discretion afforded to the CMA

4. As with other chapters, there is a distinct lack of a procedural framework and timetable applying to the CMA's investigations into suspected breaches of requirements imposed under the DMCC regime. While we recognise that there may be a case for stating that the timing for investigations into suspected breaches of competition requirements should be more reactive than, for example, in the case of SMS designation or CR investigations, because timings may need to flex depending on the nature, complexity and severity of the suspected breach, this does not warrant a complete absence of a procedural framework or timetable for such investigations. Rather, in the context of investigations that can lead to the imposition of a broad range of penalties, with significant repercussions for SMS firms, and in some cases certain individuals within them (who can be subject to criminal proceedings and director disqualification), certainty over procedure and ensuring there are sufficient opportunities to engage is vital. At present, the Draft Guidance affords the CMA an inappropriate amount of discretion in this regard.
5. The Draft Guidance also affords the CMA a wide discretion when carrying out initial assessments (paragraphs 7.8 to 7.12). No indication of the timeframe and scope of these assessments is given beyond specifying that this will "*depend on factors such as the nature and circumstances of the compliance concerns and the competition requirement concerned*" (paragraph 7.10). The Draft Guidance should be amended to provide detail on the scope, nature, and extent of initial assessments, particularly given that these initial assessments fall outside of the formal investigation process. This should include further detail in respect of their anticipated duration and timetable, and the factors which will be taken into consideration when determining whether or not to carry out an initial assessment. Paragraph 7.11 of the Draft Guidance states that the CMA will "*generally*" provide the firm with an opportunity to comment on its compliance concerns and to provide relevant representations or evidence. Preventing firms from commenting on the CMA's compliance concerns at this early stage of the process (which is inevitably a key time in determining the direction of travel of the CMA's investigation) would prejudice firms' rights of defence and risk the CMA spending time investigating suspected compliance breaches which could have otherwise been resolved quickly and easily. Accordingly, the Draft Guidance should be amended to provide for this opportunity in all cases.
6. The Draft Guidance fails to provide an indicative timetable for the key steps involved in investigations into suspected breaches of CRs and other competition requirements. Even in the context of conduct investigations, which are subject to a statutory deadline (the CMA must complete such investigations within six months with a possible three-month extension for special reasons), there is no indication as to how the key steps will fit into this. At a minimum, any investigation, whether in respect of CRs or other competition requirements, should cover the steps detailed below and the Guidance should contain a workable timetable to accommodate these steps. Although investigations into suspected breaches of other competition requirements are not subject to a statutory deadline, the Guidance should specify a period during which the CMA typically expects these to be carried out, and in the interests of consistency, this should also be six months. This would not preclude the CMA from seeking to agree (with the firm under investigation) a more condensed timetable for occasional investigations which the CMA considered were likely to be more straightforward.

Milestone	Timetable
<b>Stage 1: Initial assessment</b>	
CMA carries out an initial assessment in relation to compliance concerns with competition requirements and discusses with relevant firms	[1-3 weeks] <sup>18</sup>
<b>Stage 2: Launch of investigation</b>	
CMA launches an investigation	Day 1
CMA publishes an invitation to comment, inviting submissions from all interested parties on topics where it would welcome views	Day 1
<b>Stage 3: Evidence gathering and review</b>	
CMA conducts evidence gathering and review	Month 1-3
<b>Stage 4: Preparation and publication of provisional findings</b>	
CMA consults with firm on disclosure of evidence	Month 3
CMA issues its provisional findings and provides an opportunity for the firm to respond	Month 3 <sup>19</sup>
Consideration of responses to provisional findings and oral hearing	Month 4
<b>Stage 5: Final findings</b>	
CMA issues final findings	Month 6
Further enforcement outcomes where relevant	As appropriate

7. The Draft Guidance affords the CMA an inappropriate level of discretion in determining whether and how key elements of the investigation process will occur. For example:

7.1.1. Paragraph 7.18 provides that the CMA will publish an invitation to comment at the outset of the investigation “*where appropriate to do so*”. This is insufficient, and the CMA should commit to initiating this process in all cases. Seeking the views of interested parties at this early stage is key to ensuring that the CMA’s investigation is balanced and appropriately reflects commercial realities.

7.1.2. Paragraph 7.28 of the Draft Guidance enables the CMA to consider the most appropriate process for providing disclosure of evidence “*in the circumstances of each case*”. As the disclosure of evidence is key to ensuring that the firm is able to exercise its rights effectively, there needs to be more certainty around how this will be conducted in practice. Although examples are provided in (a) to (c) of paragraph 7.28, the CMA is not required to consider these (it “*may*” consider one or more of the options “*as appropriate*”), and the language used in the examples themselves is not definitive (e.g., it “*may*” be practicable to provide the firm with the gist of the relevant information, and the CMA “*may*” provide the firm under investigation with one or more

<sup>18</sup> The proposed duration of the initial assessment remains subject to the receipt of further clarity from the CMA on the intended scope, nature, and extent of the same.

<sup>19</sup> As with the new interim report in a Phase 2 merger inquiry, this should be at a sufficiently early stage of the process to allow the firm to meaningfully engage with the CMA on its provisional findings.

of a number of options). The Draft Guidance should be amended to provide a more definitive process for the disclosure of evidence.

b) Lack of certainty around a firm's right to engage and implications for rights of defence

8. The Draft Guidance recognises that the firm under investigation needs to be able to “*exercise its rights effectively*” (paragraph 7.28), and yet there are many instances where the right of the firm to effectively participate in the investigation process is not guaranteed or appropriately safeguarded. This is often due to the Draft Guidance affording the CMA a wide discretion in respect of the opportunities for a firm to engage in the process. Given the potential consequences of investigations for SMS firms (as set out in paragraph 44 above), the right to engage needs to be protected and this is a material oversight which should be addressed as set out below.
9. Paragraph 7.15(a) of the Draft Guidance leaves the period within which the firm may make representations in relation to a conduct investigation to be determined by the CMA on a case-by-case basis. Whilst the DMCC Act specifies that this period is such as the CMA may determine, the purpose of the Guidance is to go beyond the legislative text and provide clear and transparent guidance on the CMA's approach, and it is not sufficient for the CMA to simply restate its statutory powers and obligations. In order to ensure that firms are given adequate opportunity to make such representations (which are fundamental to their rights of defence), the Guidance should provide a minimum period of two weeks, that will be applied by the CMA in all cases, whilst noting that this will be extended where appropriate.
10. Paragraph 7.20 of the Draft Guidance should provide further clarity on the expected timing for the submission of written representations on provisional findings. Setting this on a “*case-by-case basis having regard to the individual circumstances*” alone gives the CMA a very wide discretion and lacks certainty for firms making submissions. While flexibility can be retained for specific and limited circumstances, it would again be appropriate for the Guidance to set a minimum period which firms will have in order to submit written representations. A similar approach is taken when the CMA consults on commitments offered in the context of a CA98 investigation, where those who are likely to be affected by the commitments are provided with an opportunity to give their views within a time limit of at least 11 working days (or at least six working days when revised commitments including significant changes are offered).
11. Paragraph 7.21 of the Draft Guidance states that 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*”. Given the stakes involved for SMS firms, this is not sufficient. The Draft Guidance must be amended so that there is a concrete obligation on the part of the CMA to provide the opportunity to make oral representations in order to avoid prejudicing a firm's rights of defence.
12. In respect of the disclosure of evidence, paragraph 7.28 of the Draft Guidance states that the CMA will discuss its proposed process with the firm under investigation at an “*appropriate*” stage of the investigation. Even the example provided at footnote 416 gives the CMA an unduly wide discretion in this regard: 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. Leaving aside the more general deficiencies in the current approach towards the disclosure of evidence as highlighted in paragraph 7.1.2 above, there should be more certainty around the stage at which the CMA will consult with the firm under investigation in order to safeguard the firm's right to engage in this process. This could be achieved by including the duty to consult with the firm on disclosure of evidence as a separate item in the timetable referred to above, and also by using more definitive language in any examples provided.

c) Divergence in approach between the investigation of CRs and other competition requirements

13. Although the DMCC Act makes more specific provision for the investigation of CRs, this does not mean that the CMA should not adopt a similar framework in respect of the investigation of other competition

requirements. The CMA should hold itself to the same standards for the investigation of other competition requirements as for CRs, wherever it is appropriate for it do so, in order to avoid unnecessary confusion and to develop a consistent approach. This is key to ensure legal certainty.

14. Paragraph 7.13 of the Draft Guidance applies different thresholds which need to be met in order for the CMA to open investigations into suspected breaches of CRs and other competition requirements. In the case of CRs, there must be “*reasonable grounds to suspect*” a breach (which is a statutory requirement under section 26(1) of the DMCC Act), but in the case of all other competition requirements, the Draft Guidance states that the CMA simply needs to “*suspect*” a breach (i.e., there is no requirement for that suspicion to be based on reasonable grounds). Whilst there is no equivalent statutory threshold for opening investigations into potential breaches of other competition requirements, there is no reason why a different approach is warranted. Accordingly, 7.13 should be amended to state that “*The CMA may open an investigation where it has reasonable grounds to suspect that a firm has breached a CR or one of the other competition requirements*”.
15. Paragraph 7.32 of the Draft Guidance replicates the statutory requirement (section 28(2) of the DMCC Act) that when the CMA decides to close a conduct investigation without making a finding, it must provide a notice to that effect to the firm to which the investigation related. There are no equivalent parameters in the Draft Guidance which govern how the CMA will close an investigation into the suspected breach of all other competition requirements without making a finding, presumably because the statute does not provide for this. It is unclear why CRs and other competition requirements should be treated differently in this respect, and this is a case where the CMA should hold itself to the same standards. This is necessary in order to provide legal certainty for the firms who may be subject to these investigations, as it is unclear how they will otherwise be made aware that the CMA has decided to close an investigation without making a finding. The Draft Guidance should be amended so that when the CMA decides to close an investigation into other competition requirements, it must provide a notice to that effect to the firm to which the investigation related. Such a notice should include the same information set out at paragraph 7.32(a) of the Draft Guidance, save for paragraph 7.32 (c) which would not be applicable as this refers to the CBE which relates only to conduct investigations.

### C. Enforcement of conduct requirements

#### a) Lack of procedural framework

16. As with breaches of competition requirements, the Draft Guidance also fails to provide a procedural framework with an indicative timetable for the processes and procedures that apply only to the enforcement of CRs.
17. In respect of interim enforcement orders (IEOs), the Draft Guidance acknowledges the “*time critical nature*” of the process (see, for example, paragraphs 7.46 and 7.52), and that the obligations imposed by the IEO will typically enter into force immediately or otherwise within a short period of the CMA imposing the order (paragraph 7.52). The Draft Guidance fails, however, to give any indication of the timeframe within which the CMA will undertake its assessment of whether an IEO is required, and ultimately impose the order. In the context of merger investigations, whilst the CMA is permitted under the Enterprise Act 2002 to make IEOs at any stage of the Phase 1 investigation process, its guidance on [Interim measures in merger investigations](#) provides further detail on the likely timing of this.<sup>20</sup> The Guidance should take a similar approach in order to provide certainty for firms who may be subject to conduct investigations, for example by making clear that IEOs will be considered and imposed by the CMA as soon as (or before) it launches an investigation into a suspected breach of a CR. This will prevent firms from facing the uncertainty which comes with the possibility of the CMA imposing an IEO at any point during the conduct investigation period

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<sup>20</sup> See, for example, paragraph 2.2 which provides that if a merger has been notified to the CMA then interim measures are likely to be put in place upon the completion of the merger, and if the CMA investigates a completed merger which has not been notified to it, it is likely to impose an IEO very shortly after sending an initial enquiry letter.

(which can be up to six months from the day on which the conduct investigation notice is given to the undertaking), and enable them to more effectively plan their compliance.

18. The Draft Guidance fails to specify a timeframe for the CMA's assessment of the CBE, including how long it expects this assessment to take. Whilst this will to an extent be dependent on the nature of the representations made by the firm under investigation, the Guidance should, at least, provide an indication of the timeframe for this assessment. Firms subject to a conduct investigation should be able to make representations as to the application of the CBE at any stage of the investigation (this is necessary to enable firms to exercise rights of defence (see paragraph 8 above)) - the Guidance should make this explicit.
19. Paragraph 7.95 of the Draft Guidance repeats the statutory obligation on the CMA to make any enforcement order (EO) "*as soon as reasonably practicable*" after giving the firm its notice of findings that a CR has been breached, but fails to expand on what this means in practice. The purpose of the Guidance is to go beyond the legislative text and provide clear and transparent guidance on the CMA's approach, and it is not sufficient for the CMA to simply restate its statutory powers and obligations. The CMA should supplement this paragraph by providing an indication of the actual timeframe within which it typically expects to make an EO.
  - b) Failure to effectively preserve a firm's right of defence
20. There are a number of instances where the Draft Guidance fails to enable firms subject to conduct investigations to exercise their rights effectively.
21. IEOs have the potential to be burdensome and disruptive for the parties concerned. Our experience with the UK merger control regime is that IEOs (and other interim orders) are onerous and costly to comply with, and we expect the same to be true with IEOs under the DMCC regime. As such, it is vitally important that firms are given sufficient opportunity to be involved in the IEO process, including by way of making representations to the CMA before an IEO is imposed. Whilst the CMA is entitled under the DMCC Act to make an IEO without first giving the firm an opportunity to make representations, paragraph 7.45 of the Draft Guidance should clarify that firms will only be denied this opportunity in specific and limited circumstances. In cases where firms are not given such an opportunity until after the order has been imposed, paragraph 7.49(b) of the Draft Guidance should provide further clarity on the period within which the firm may make representations in relation to the IEO. Whilst footnote 439 repeats the CMA's statutory discretion in this regard (i.e., that this period will be at the CMA's determination), the purpose of the Guidance is to go beyond the legislative text and provide clear and transparent guidance on the CMA's approach. As such, the Guidance should give an indication of what this period is likely to be, with a minimum period that will be applied by the CMA in all cases (noting that this will be extended where appropriate).
22. Given the implications of the imposition of an EO on an SMS firm, including reputational (as the firm will be found to have breached a CR) and in terms of the obligations that the EO places on the firm, it is necessary that firms are given sufficient opportunity to review and comment on an EO in draft form before it is imposed. At present, the Draft Guidance gives the CMA considerable discretion in this regard. Paragraph 7.96 states that the CMA will "*typically*" share with the firm any draft EO that it intends to impose, and footnote 474 states that the CMA will provide this opportunity "*unless it is not appropriate to do so*". Instead of "*typically*" sharing a draft EO with the firm, the Guidance should make clear that this will be the case other than in specific and limited circumstances (with examples of what those circumstances might be). The example given in footnote 474 of it not being appropriate to provide this opportunity where EO obligations are straightforward in nature is not sufficient in this regard, and should be removed.
23. For the reasons given in paragraph 22 above, it is difficult to envisage circumstances in which it would not be appropriate for the CMA to consult the firm to which the EO applies under paragraph 7.107(a) of the Draft Guidance before making a revised version of the order. The CMA should therefore commit in the Guidance to consulting specifically with the firm in question (rather than just to "*such persons as it considers*

*appropriate*", which again merely replicates the relevant statutory provision), other than in specific and limited circumstances.

- c) Lack of clarity on when the CBE will apply, compounded by the Draft Guidance imposing firm conditions which go beyond the legislative text
24. Where a firm makes representations which lead the CMA to consider that the CBE applies, the CMA must close its conduct investigation. The CBE is therefore crucial to a firm's right of defence, and the Guidance must be clear as to when it will apply, including the conditions that need to be met by the firm in question.
25. In order for the CBE to apply, the firm under investigation must provide representations that lead the CMA to consider that the five conditions set out in paragraph 7.58 of the Draft Guidance are met, and paragraph 7.60 of the Draft Guidance requires that these be supported by "*clear and compelling evidence*". The Draft Guidance fails to provide any detail on what constitutes "*clear and compelling evidence*". It is also unclear whether evidence is required in relation to all five of the conditions which must be satisfied in order for the CBE to apply. The only guidance given as to what might constitute appropriate evidence is in respect of condition 1 (benefits to users or potential users), and there is no reference to evidence in respect of the remaining four conditions. The Guidance should either be explicit that evidence is only required in respect of the first condition, or alternatively, the sections on the remaining conditions should be supplemented with examples of what might be deemed to be appropriate evidence for these conditions.
26. Section 29(2)(a) of the DMCC Act, which sets out the first condition, states that the CBE will apply where the conduct to which the investigation relates gives rise to benefits to users or potential users of the relevant digital activity. Paragraph 7.65 of the Draft Guidance makes this more stringent by requiring the firm to 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 in order to satisfy the condition. It is inappropriate that the Draft Guidance imposes a higher threshold on the firm in question, and paragraph 7.65 should be amended to correctly reflect the underlying legislation.
27. Paragraph 7.65 of the Draft Guidance also provides that where benefits have not yet been realised, the CMA will expect them to be "*sufficiently timely and likely*". In order to provide firms with greater certainty as to when the CMA is likely to consider the CBE to apply, this paragraph should be amended to provide further clarity on the circumstances in which the "*sufficiently timely and likely*" criteria will be met (for example, by specifying a time by which the CMA will usually expect benefits to be realised).
28. The third condition of the CBE criteria requires that the benefits could not be realised without the conduct. Paragraph 7.68 of the Draft Guidance states that this condition imposes a standard that is akin to the "*indispensability*" test in section 9(1)(b) of the CA98, and that the CMA will therefore have regard to the interpretation of that test when applying condition 3. This is an incredibly high bar and is not the right test in a regime which is novel, and unlike the CA98, not designed to address conduct which has been shown to infringe well-established competition law. It is unclear why importation of a test from another regime would be appropriate in this context, particularly given that the CMA has repeatedly indicated elsewhere in the Draft Guidance that adopting concepts from other regimes is not its intention.
- d) Further guidance needed on the CMA's approach to the application of the final offer mechanism (FOM)
29. The guidance provided on the CMA's approach to the application of the FOM lacks certainty, and should be supplemented as follows.
- 29.1. One of the conditions which must be met in order for the CMA to exercise its power to adopt the FOM is that it could not satisfactorily address the breach within a reasonable timeframe by exercising any of its other digital markets functions. Paragraph 7.122 of the Draft Guidance lists the digital markets functions which are likely to be most appropriate in this regard. In assessing whether these functions

are likely to be suitable alternatives to the FOM, paragraph 7.123 states that the CMA will “likely” consider two factors. It is not sufficiently certain to say that the CMA will “likely” consider these factors. The CMA should commit to a minimum set of factors that it will consider, and the word “likely” should be removed from this paragraph.

29.2. Paragraph 7.127 of the Draft Guidance states that “*the precise timeline of the FOM and its intermediate steps will depend on the transaction in question*”. This lacks certainty - the Guidance should provide some indication as to how the intermediate steps will fit into the six-month period that the CMA has to make a final offer order after initiating the FOM process, and the relative point in time at which each of these will occur.

29.3. The Draft Guidance provides limited information on the factors that the CMA will take into consideration when selecting a preferred bid (paragraph 7.139). In order to provide greater transparency, the Guidance should expand on this.

## Chapter 8 of Draft Guidance: Penalties for failure to comply with competition requirements

### A. Summary of key comments

1. The CMA has previously referred to its objective of ensuring that appropriate penalties are set in a “*fair, consistent, predictable and transparent manner*” across the range of cases in its enforcement portfolio.<sup>21</sup> This should extend to any penalties for failure to comply with competition requirements under the DMCC regime. However, at present, the Draft Guidance represents a departure from the CMA’s previously consistent approach to penalties.
2. While we recognise that this is a novel regime, and it is not necessarily appropriate to replicate the positions adopted in other guidance wholesale, there is a lack of consistency in the CMA’s approach in this regard, without a clear rationale. For example, the section of the Draft Guidance on steps for determining the level of penalty is in many ways reflective of the [CMA’s guidance as to the appropriate amount of a penalty \(CMA73\) \(Penalties Guidance\)](#) which is already well understood by potential SMS firms and other relevant parties, and will assist in supporting the CMA’s objective to achieve consistency across the range of cases in its enforcement portfolio. However, in a number of instances, the Draft Guidance departs from the approach in the Penalties Guidance, without a clear reason for doing so. This inconsistent approach risks undermining both the CMA’s objective of achieving consistency, and the predictability of the CMA’s approach towards penalties in this new regime. In these cases, the Draft Guidance should be amended to reflect the position in the Penalties Guidance.
3. The Draft Guidance also affords the CMA a level of discretion which risks compromising both consistency and predictability. In particular:
  - 3.1. There is a lack of detail as to how key concepts (such as the “*without reasonable excuse*” threshold, the “*meaningful cooperation*” mitigating factor, and the CMA’s assessment of proportionality) will be applied, leading to a lack of clarity in regarding the CMA’s approach to penalties under the DMCC regime; and
  - 3.2. The CMA has a wide discretion to consider factors outside of those cited in the Draft Guidance. For example, the CMA, when determining relevant turnover and in its assessment of size, economic power and financial position as aggravating factors, has unjustifiably broad discretion which undermines the predictability of the CMA’s approach. In these instances, the Draft Guidance should be amended to clarify that the CMA will only consider factors outside of those cited in the Draft Guidance, in specific and limited circumstances.
4. Separately, the Draft Guidance envisages the CMA running its penalty cases in parallel to the investigations themselves, which is inherently problematic as it clearly risks prejudicing the outcome of the investigations. The Draft Guidance should therefore be amended to make clear that a penalty case will only be run, at the earliest, once the CMA has issued provisional findings to the effect that a competition requirement has been breached.

### B. Penalties for failure to comply with competition requirements

#### a) Unwarranted change of approach to the CMA’s guidance as to the appropriate amount of a penalty

5. The section of the Draft Guidance on steps for determining the level of penalty is in many ways reflective of the CMA’s Penalties Guidance, which is already well understood by potential SMS firms and other relevant parties, and will assist in supporting the CMA’s objective to achieve consistency across the range of cases in its enforcement portfolio. There are, however, instances of the Draft Guidance departing from the Penalties Guidance, in circumstances where this is not warranted in the context of the DMCC regime. By way of example:

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<sup>21</sup> Paragraph 1.6 of the [consultation document](#) relating to the CMA’s draft guidance as to the appropriate amount of a penalty.



- 5.1. In the Penalties Guidance, “*relevant turnover*” is limited to the turnover of the undertaking in the “*relevant product market and relevant geographic market affected by the infringement*” in the undertaking’s last business year. The Draft Guidance fails, however, to limit “*relevant turnover*” to that generated in the product or geographic markets to which the SMS designation applies, and it is broadly defined as being the amounts derived by the undertaking from the sale or provision of products to customers in the UK (paragraph 8.23). Taking into account all of an SMS firm’s UK turnover risks overstating the starting point for the calculation of a penalty, which in turn could lead to disproportionate penalties being imposed which do not reflect the impact of the infringement. It is unclear why the CMA has departed from its Penalties Guidance in this way, and paragraph 8.23 of the Draft Guidance should be amended accordingly.
- 5.2. Paragraph 8.37(a) of the Draft Guidance treats “*unreasonable behaviour or attempts to frustrate that delays the CMA’s enforcement action*” as an aggravating factor enabling it to increase the amount of the penalty. This sets a lower bar than the equivalent position in the CMA’s Penalties Guidance, which requires unreasonable behaviour to be “*persistent and repeated*” before it will constitute an aggravating factor (paragraph 2.16 of the same). It is unjustifiable for the Draft Guidance to depart from the Penalties Guidance in this way, and paragraph 8.37(a) should be amended to refer to “*persistent and repeated unreasonable behaviour or attempts to frustrate that delays the CMA’s enforcement action*”.
- b) The CMA retains a level of discretion which compromises consistency and predictability, and further guidance is required
6. Paragraph 8.15 of the Draft Guidance restates the statutory position that the CMA may only impose a penalty where it considers that a failure to comply with a requirement is “*without reasonable excuse*”. This is consistent with the threshold applied in the context of penalties imposed for failing to comply with requirements under the EA02 and CA98, and interim measures in merger cases. Paragraph 8.16 replicates the guidance on what will constitute a “*reasonable excuse*” from paragraph 2.4 of [Administrative Penalties: Statement of Policy on the CMA’s approach \(Administrative Penalties Guidance\)](#). However, unlike the Administrative Penalties Guidance, it fails to provide any illustrative examples. In order to give firms more certainty as to how this threshold is likely to be applied in practice in the context of the DMCC regime, paragraph 8.16 of the Draft Guidance should be amended to include illustrative examples, such as a significant and demonstrable IT failure which prevented a firm from meeting a deadline.
7. The determination of relevant turnover forms the basis of the CMA’s approach to assessing the amount of a financial penalty to impose. There needs to be clear guidance in place as to how this determination will be made in order to ensure consistency and predictability across all penalties imposed by the CMA under the DMCC regime. At present, the Draft Guidance affords the CMA an inappropriate level of discretion in this regard.
8. Paragraph 8.24 states that the CMA will “*typically*” base relevant turnover on figures from an undertaking’s audited accounts, but “*may also rely on other relevant information*”. Footnote 548 then provides a long list of factors that the CMA may base the determination of relevant turnover on, including business plans, key performance indicators, and executive compensation plans. In order to provide greater certainty around the determination of relevant turnover, the Guidance should make clear that the CMA will only depart from an undertaking’s audited accounts in specific and limited circumstances. The references to business plans, key performance indicators, and executive compensation plans should also be removed from footnote 548 as these are too far removed from an undertaking’s turnover to give rise to any level of predictability in this assessment.
9. Despite this already wide discretion, paragraph 8.27 of the Draft Guidance enables the CMA to depart from its “*typical approach*” altogether, and substitute an alternative figure and/or relevant period. The Draft Guidance gives no indication as to how this alternative figure or relevant period will be determined. This is an unacceptable omission which will give rise to considerable uncertainty, and this paragraph should either be removed (or, at the very least, the paragraph should be amended so that it is clear that such a departure

will only occur in specific and limited circumstances), and/or the Draft Guidance should be supplemented with further detail on how this determination will be made.

10. Paragraph 8.32 of the Draft Guidance enables the CMA to increase the penalty in order to ensure that it achieves effective deterrence in view of the undertaking's "*size, economic power and financial position*". Paragraph 8.34 states that, in assessing this, the CMA will typically take into account the undertaking's worldwide turnover at the time the penalty is being imposed as the primary indicator, but has a wide discretion to depart from this (where "*other metrics are more appropriate*", and/or where the "*circumstances indicate that a different period may be appropriate*"). This risks compromising the consistency and predictability of penalties imposed by the CMA. The Guidance should make clear that the CMA will only depart from the primary indicator in specific and limited circumstances, and give examples as to what those might be. It should also elaborate on when and what "*other metrics*" and "*different period*" might be more appropriate than the undertaking's worldwide turnover at the time the penalty is being imposed.
11. Paragraph 8.38(b) of the Draft Guidance provides that the CMA may consider "*meaningful cooperation*" as a mitigating factor when determining the level of a penalty, but fails to provide any examples as to what this might entail. This leaves SMS firms without guidance as to how they can meet this threshold, which is unsatisfactory both for the firm and the CMA (as there is also a clear benefit to the CMA arising from meaningful cooperation, and firms are more likely to provide this where there is clarity around what it entails). The Draft Guidance should therefore be amended to provide examples of what the CMA would consider to be "*meaningful cooperation*" in this context (similar to the approach taken in footnote 31 of the Penalties Guidance).
12. A penalty must be proportionate in the circumstances in order to be fair and effectively serve its purpose, but the Draft Guidance lacks any detail on how the CMA will undertake this assessment (paragraph 8.40). The Draft Guidance should therefore be supplemented to avoid affording the CMA undue discretion in this regard, and to promote transparency and consistency in the CMA's decisional practice. A similar level of detail should be provided to that included in paragraphs 2.25 to 2.27 of the Penalties Guidance.

c) Risk of prejudicing the outcome of an investigation into a suspected breach of competition requirements

13. Paragraph 8.45 of the Draft Guidance enables the CMA to run a penalty case and an investigation into a suspected breach of competition requirements in parallel, and to issue a provisional penalty notice at the same time as provisional findings of the breach. This is inherently problematic as it risks prejudicing the outcome of the investigation if the CMA has already turned its mind to penalties before determining that a competition requirement has actually been breached. It is difficult to see how the CMA would be able to conduct a fair and objective investigation in circumstances where it already has penalties in mind. As such, the Draft Guidance should be amended to make clear that a penalty case will only be run, at the very earliest, once the CMA has issued provisional findings to the effect that a competition requirement has been breached.

## Chapter 9 of Draft Guidance: Administration

### A. Summary of key comments

1. The stated purpose of the Administration chapter is to explain the administrative processes that the CMA will follow when carrying out its digital market functions across the regime. It is important for administrative processes to be robust in order to establish (as this is a new regime), and then preserve, the integrity of the DMCC regime.
2. In order to achieve this objective, and for the reasons set out in detail below, it is necessary for the CMA to supplement this chapter in the Draft Guidance, in particular to provide: (a) guardrails on the CMA's ability to extend normal time limits; (b) further clarity around how the CMA will exercise its functions as transparently as possible; (c) more detail around the enforcement of the power to charge a levy; and (d) safeguards around the coordination with relevant regulators.

### B. Administration

#### a) Lack of guardrails on the CMA's ability to extend normal time limits

3. Under section 104 (1) of the DMCC Act, the CMA may publish a notice extending an SMS investigation period, a conduct investigation period, a PCI 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. The use in the legislation of the word "*special*" suggests that the circumstances in which the CMA can initiate such an extension are intended to be exceptional and limited, and that its reasons for doing so would need to relate to circumstances which are out of the ordinary and unusual. This is appropriate given that the extension of relevant investigation and final offer periods leads to prolonged uncertainty for firms.
4. The Draft Guidance fails to convey this. Paragraph 9.3 states that "*special reasons*" include occasions where there are "*specific reasons which justify an extension of the normal time limits*", which is unduly broad, and goes further than the underlying legislation. The examples of special reasons focus either on the CMA or on external factors, rather than circumstances related to the nature of the decision in question. The definition of "*special reasons*" and the examples given in the Draft Guidance should be narrowed and refined in order to more accurately reflect the natural meaning of the term. By way of example, one specific reason that the CMA has included in the Draft Guidance is the receipt of "*new relevant information*". The receipt of new relevant information alone, would not necessarily constitute a "*special reason*" for extension; this example could be narrowed and refined to cover the receipt of particularly voluminous information, or compelling and credible new information which contradicted information the CMA had already received and considered (depending on the circumstances). Separately, as set out in other sections of this response, the risk of new information jeopardising statutory timelines can be effectively managed by setting out a clear process and milestones which ensure that the CMA and relevant stakeholders have clarity as to when to engage and produce evidence.
5. The "*special reasons*" threshold is also used for the extension of time periods in the context of market investigations, and where this applies to the implementation of remedies, the relevant guidance envisages that the power to extend the timetable is most likely to be used where the remedies themselves are more complex.<sup>22</sup> The same is likely to be true in the context of the DMCC regime, with the power to extend the timetable most likely being required in complex cases (for example, where there are multiple parties, issues and/or markets), in order to ensure a thorough and fair consideration of the issues raised and proper engagement with the parties. The Guidance should explicitly acknowledge this. In addition, it should generally be clear by the time of the provisional findings how likely it is that an extension will be required. The CMA should commit in the Guidance to providing an update on the likelihood of an extension at this stage of the process in order to allow parties to prepare and plan accordingly.

#### b) The Draft Guidance fails to ensure that the CMA will exercise its functions as transparently as possible

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<sup>22</sup> [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#) (CMA3), paragraph 4.7.

6. The Draft Guidance explicitly recognises the importance of transparency as 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 (paragraph 9.17). Despite this, the Draft Guidance contains only an assurance that the CMA “*will seek*” to operate the DMCC regime in a transparent manner, and outlines only the “*minimum steps*” that the CMA will take to ensure transparency (paragraph 9.22), with the remainder left to the discretion of the CMA.
7. Given the fundamental importance of transparency to due process and fairness, this is inadequate, and the Guidance should be more prescriptive on the steps that the CMA will take in this regard. In particular (and reflective of the comments made in relation to previous sections of the Draft Guidance above), the Guidance should set out:
  - 7.1 an explicit obligation that the CMA “*will*” operate the DMCC regime in a transparent manner;
  - 7.2 more detail on what “*appropriate information*” might cover in paragraph 9.16;
  - 7.3 examples of how the CMA will commit to keeping the primary parties (and interested persons, if appropriate) “*informed*” of key developments, and what the CMA considers to be “*key developments*” (see paragraph 9.18); and
  - 7.4 what “*information*” will be provided to firms at the early stages of investigations, and more precisely when this information will be provided.
- c) The Draft Guidance needs supplementing in relation to the power to charge a levy
  8. Paragraph 9.39 of the Draft Guidance makes clear that the CMA will exercise its statutory power to require SMS firms to pay a levy to cover the costs of its digital markets functions. The Draft Guidance acknowledges the CMA’s statutory obligation to consult on the levy rules before they are made, but fails to explicitly set out who the CMA intends to consult in this regard. Given the financial burden that the levy rules will place on SMS firms, it is important that the Guidance provides as much detail as possible on the proposed consultation process, and this paragraph should be amended to explicitly confirm SMS firms will be consulted.
  9. For clarity, the Guidance should acknowledge that the duty to consult also applies to any amendment to or replacement of the levy rules.
- d) Insufficient safeguards regarding coordination with relevant regulators
  10. Paragraph 9.35 of the Draft Guidance refers to the CMA’s duty to consult other regulators (specified in section 107 of the DMCC Act) where their remits and responsibilities might be impacted by the exercise of its digital markets functions. Through the exercise of these functions, the CMA will have access to a wide range of confidential and sensitive information whose disclosure could significantly harm the legitimate business interests of the SMS firms to which it relates. The Draft Guidance should provide clarity as to what information is likely to be shared with the relevant regulators, and how the CMA intends to safeguard this in order to meet its statutory obligations to protect confidential information from unlawful disclosure. If the intention is for this to be dealt with in the bilateral Memoranda of Understanding between the CMA and the relevant regulators referred to in paragraph 9.37, then the Guidance should make this explicit and set out the factors the CMA expects to include in this Memoranda.

## Guidance on the mergers reporting requirements for SMS firms

### A. Summary of key comments

1. We welcome the CMA's decision to issue the separate draft Mergers Guidance (the final version of the same is referred to throughout this section as the **Mergers Guidance**) and Reporting Notice (the **draft Notice**) and consider that these provide a helpful guide to the new reporting requirement. In particular, we welcome the fact that the draft Mergers Guidance draws on the wealth of experience the CMA has built up and developed in enforcing the wider mergers regime by cross-referencing other CMA mergers guidance. As noted throughout this response, we agree that guidance provided in the DMCC context should draw on the established experience of the CMA in administering other regimes.
2. Nonetheless, as with the remainder of the Draft Guidance, there remain areas where the draft Mergers Guidance and draft Notice: (a) simply restate the DMCC Act itself, with little explanation of how the CMA intends to interpret and apply the legislation in practice; (b) reference other CMA guidance without, again, making clear how this is intended to apply in the context of DMCC mergers reporting obligations; and / or (c) provide insufficient clarity on how the reporting requirement process will be applied in practice.
3. Given the wide range of potential transactions the SMS reporting requirements will apply to and the impact these obligations will have on the SMS firms and third parties that they are proposing to transact with, the draft Mergers Guidance and draft Notice should be expanded to:
  - 3.1. give SMS firms comfort that the CMA will provide meaningful engagement at the pre-report stage to provide additional clarity and maximise the efficiency of the process (particularly in the early stages of the regime);
  - 3.2. provide further clarity on the nature and extent of information which SMS firms are required to provide to comply with the reporting obligation, in order to give certainty to both SMS firms and the targets they are looking to transact with; and
  - 3.3. recognise and include an exemption for SMS firms from providing information on targets in circumstances where such information is not available to the SMS firm, e.g., because the reportable event is a "hostile" transaction.
4. As the CMA knows, the "UK nexus" test is a critical factor in determining whether the merger reporting requirements arise. Therefore, while we welcome the CMA's intention to consult further on guidance relating to the "UK nexus" test, it is important that this consultation process is concluded and the guidance issued prior to the reporting regime coming into effect, so as to ensure that SMS firms and the companies they are transacting with have clarity as to the scope of the reporting requirement.

### B. The CMA's proposed approach in relation to the merger reporting requirement for SMS firms

5. The CMA should provide additional comfort regarding pre-reporting engagement
  - 5.1. The draft Mergers Guidance provides that: "*The CMA may engage with parties prior to SMS Acquirers reporting the transaction, just as they sometimes do prior to merger parties formally notifying the CMA of a merger*" (paragraph 4.5). We welcome this statement and agree that meaningful engagement from the CMA at the pre-report stage will be crucial in providing clarity and certainty for both SMS Acquirers (as defined in the draft Mergers Guidance) and the parties they are looking to transact with and will help maximise the efficiency of the reporting process. This is particularly the case as the reporting requirement is a potentially extensive obligation on SMS Acquirers which goes beyond other similar regimes, for example the European Commission's DMA regime (which only requires that the European Commission is informed of an acquisition relating to specific types of digital businesses prior to closing – without scope for the Commission to accept/reject such a report). However, the draft

Mergers Guidance should be amended and expanded to provide additional comfort to SMS Acquirers and other stakeholders. In particular:

- 5.1.1. the language in paragraph 4.5 should be updated to make clear that the CMA “will” rather than “may” engage with the parties at the pre-report stage;
  - 5.1.2. the Mergers Guidance should provide additional clarity on what will constitute “sufficient” information according to section 62(3) of the DMCC Act, which will be particularly helpful in the early stages of the regime, when there is no established practice in relation to this. For example, the CMA should provide examples as to the way in which the “sufficient” threshold in relation to the reporting requirement differs to the “sufficient information” thresholds for (a) beginning an investigation for the purposes of deciding whether to make a reference under section 33 of Enterprise Act 2002 (EA02) in relation to a reportable event or (b) making an initial enforcement order under section 72 of the EA02 in relation to a reportable event; and
  - 5.1.3. while we expect that engagement with the CMA at the pre-report stage will be a much less intensive process than pre-notification discussions in the context of a merger notice, or indeed engagement with the Mergers Intelligence Committee as part of a briefing paper process, the Mergers Guidance should confirm this.
- 5.2. Committing to pre-reporting engagement and providing greater clarity on the information required / sufficient to meet that requirement would bring the Mergers Guidance closer to the approach taken in:
- 5.2.1. the CMA’s [Merger Notice Template](#) which states that “[w]here notifying parties have engaged in pre-notification discussions with the CMA and/or submitted draft(s) of the notification to the CMA (...), the CMA will make clear to notifying parties as part of such engagement what information it expects to be necessary for a Satisfactory Notification in the case at hand”; and
  - 5.2.2. [Mergers: Guidance on the CMA’s jurisdiction and procedure \(CMA2\)](#) which notes that “the pre-notification process is intended to facilitate: (a) the clarification of the information and evidence the CMA will require for the purposes of the Merger Notice and is likely to require during the 40 working day investigation; (b) the clarification of any types of information in the Merger Notice form that the CMA does not consider necessary for a complete notification in the case at hand”.
6. Proposed consultation on updating the “UK nexus” test guidance is critical and revised guidance must be issued prior to the reporting regime coming into effect
- 6.1. Given that the “UK nexus” is a key determining factor as to whether or not a reporting requirement arises it is crucial that sufficient guidance is provided on this aspect before the draft Mergers Guidance is finalised and the reporting requirement comes into force.
  - 6.2. In this context, currently the draft Mergers Guidance (paragraph 3.15) refers SMS Acquirers to CMA2 guidance regarding factors which suggest that a target carries on activities in the UK (i.e., the UK nexus test). However, such guidance in CMA2 is currently limited. The consultation referred to in the draft Mergers Guidance to revise CMA2 and address this point is yet to be launched.
  - 6.3. We welcome the fact that the CMA will consult on the UK nexus test. However, the CMA2 must be completed before the reporting regime comes into force. Stakeholders must still be given sufficient time to comment and respond to proposed changes. This holds true for provisions relating to the “UK

*nexus test*” as well as all of the other numerous aspects/provisions of CMA2 referenced in the draft Mergers Guidance (to the extent these undergo changes following the CMA2 consultation).

7. The Mergers Guidance should use more decisive language to ensure certainty, predictability and transparency

7.1. Paragraph 4.2 and footnote 36 of the draft Mergers Guidance provide that SMS Acquirers “*may refer*” to the CMA’s guidance on submitting a case team allocation form (CMA2, paragraph 6.14) in assessing whether a transaction is sufficiently advanced to submit a report. The use of this language implies that there may be circumstances outside of paragraph 6.14 CMA2 which may indicate that “*a transaction is sufficiently advanced to submit a report*”. To provide greater clarity for SMS Acquirers, the language should be amended to “*should refer*”.

8. The Mergers Guidance should introduce guardrails in relation to the CMA’s consent process

8.1. In relation to providing consent for closure of a transaction prior to the end of the waiting period identified in section 57(1), the draft Mergers Guidance currently only notes that “*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*”. The Mergers Guidance should provide guidance on the circumstances in which the CMA may be prepared to provide such prior consent. Such circumstances could be, for example, where a target firm is at risk of entering administration or otherwise failing if it is unable to receive investment in a timely manner, and, *prima facie*, the transaction raises no competition concerns.

8.2. In addition, in relation to the power to “*revoke*” consent, we assume that the intention is that this is akin to the CMA’s briefing paper process whereby the CMA will indicate that it has no further questions when it decides not to open an investigation immediately (paragraph 4.2 of [Guidance on the CMA’s mergers intelligence function \(CMA56 revised\)](#)) but which leaves open the possibility for the CMA to change its position. However, the draft Mergers Guidance provides no guidance on the circumstances where the CMA may choose to revoke consent. The CMA’s starting point should be that it would only consider revoking consent in specific and limited circumstances, and the Mergers Guidance should clearly set out what these would be. This would be consistent with the CMA56 revised which makes clear that the CMA would only change its position and open an investigation (having previously indicated that it would not) “*if further information comes to light*” (paragraph 4.2 of CMA56 revised). This type of guidance is crucial to provide a sufficient level of comfort not only for SMS Acquirers but also the third parties that they are looking to transact with as to when this power would be utilised.

9. SMS Acquirers would benefit from more guidance concerning terminology adopted from the DMCC Act

9.1. Paragraph 4.4(a) of the draft Mergers Guidance provides that the duty to report does not apply in relation to a reportable event if it does not differ in any material extent from an event already reported under section 57(1) of the DMCC Act.

9.2. As noted above in relation to various provisions of the remainder of the Draft Guidance, while we appreciate that it will not be possible to include examples which capture all nuances of a regime intended to apply across complex and differentiated markets, firms need illustrated examples for

transparency to help them understand what is meant by “*material extent*” in this context, as well as examples of the types of circumstances which would engage this provision.

### C. SMS Merger Reporting Notice

#### 10. The draft Notice should provide additional guidance on the type, nature and scope of information required to comply with the reporting obligation

10.1. The draft Notice provides helpful guidance to SMS Acquirers but, contains limited guidance (and no illustrative examples) on the nature and extent of information which SMS Acquirers should provide in order to comply with their reporting obligation.

10.2. This should be addressed by, for example, providing an indicative page limit for a report (similar to the page limit for additional material to be included with a report (referenced in paragraph 5.4 of the draft Mergers Guidance) or the page limit in the Mergers Intelligence Committee “*briefing paper*” process), and/or by providing explanatory notes in the draft Notice, similar to those provided for the template Merger Notice (though we expect that information required for a Merger Notice would clearly be more detailed than that required for a report in this context).

#### 11. SMS Acquirers should not be expected and required to provide information which is not available to them

11.1. In some circumstances, information relating to the Target, and required by the draft Notice, will not be available to SMS Acquirers. This includes, for example, Question 7 which requires information on a Target’s customers and pipeline or planned future products/services, Question 10 relating to interactions between a target and competitors of an SMS Acquirer and information on the competitors of the Target (Question 11). The CMA should recognise and reflect this when finalising the draft Mergers Guidance and the draft Notice and include a specific exemption from the requirement to provide such information when it is not available to an SMS Acquirer.

11.2. This approach would be in line with the CMA’s Merger Notice Template (paragraph 21) which recognises that “[n]otifying parties may consider that it is not necessary to provide certain information requested in the Notice. This may be the case, for example, where: (...) The information requested is not available to the notifying party (Eg. where the merger is a ‘hostile’ transaction)”.

11.3. This approach would be in line with the CMA’s Merger Notice Template which only requires (at Part II 2(g)), parties to “[d]escribe the arrangements by which the enterprises will cease/have ceased to be distinct (the merger), including: (...) whether it is being notified in any other jurisdictions”)