Response to Consultation on the Digital Markets Competition Regime Guidance

1. We welcome the opportunity to comment on the CMA's proposed digital markets competition regime guidance, dated 24 May 2024 (the "Draft Guidance"). The Digital Markets, Competition and Consumers Act 2024 (the "DMCC Act") is an important piece of legislation and we recognise the extensive work undertaken by the CMA to produce the Draft Guidance. We have set out below a few comments on the Draft Guidance.

What constitutes a digital activity?

- 2. The DMCC Act clearly envisages hardware or physical devices forming part of digital activities. For example, the CMA has previously stated that "mobile devices are essentially small computers that can be used to access the internet... [and] are widely recognised and understand to be digital technology". Hardware and physical devices may be used to for the provision of a service by means of the internet, or the provision of pieces of digital content, and therefore fall within Section 3(1)(c) of the DMCC Act. The final guidance should therefore briefly explain how hardware and physical devices can form part of digital activities and explicitly refer to hardware and physical devices. The Draft Guidance currently gives examples for Sections 3(1)(a) and (b) of the DMCC Act and it would be beneficial if it also gave examples under Section 3(1)(c) of the Act.
- 3. The Draft Guidance helpfully provides examples of 'digital content' in paragraph 2.9. This should also include digital tokens as an example of digital content. Digital tokens are a digital representation of information or content that are used to convey information. Digital tokens have an important role in transmitting information between devices and are increasingly common as part of the expanding 'Internet of Things'. They should therefore be included as common examples of 'digital content' alongside "software, music, computer games and applications".
- 4. The CMA envisages that multiple products could be considered within a single digital activity as paragraph 2.10 of the Draft Guidance refers to "considering which of the firm's products it may comprise". However, the final guidance should make clear that each component/product that combines to make a digital activity does not individually need to satisfy all the requirements for being a digital activity. For example, an app could offer several features or services which individually did not satisfy all the requirements for a digital activity but together satisfy the requirements for a digital activity.

Monitoring

5. The CMA recognises the importance of protecting the identity of complainants and the confidentiality of information they provide. The Draft Guidance states in paragraph 6.19 that "the CMA may be required by law to disclose information relating to a complaint". We would suggest that the CMA elaborates on the circumstances in which it would be required to disclose information relating to a complaint to give greater clarity and confidence to third parties. This could include

¹ CMA, Mobile Ecosystems Market Study, Final Report, Appendix L, paragraph 15

providing further guidance on confidentiality of complaints or by reference to another piece of CMA guidance.

Final Offer Mechanism

- 6. Collective submissions and the joining of third parties are a helpful aspect of the final offer mechanism which will bring consistency and procedural efficiency. However, discussions between the parties on collective submissions will need to be carefully managed to avoid the risk that they involve the sharing of competitively sensitive information. This risk is particularly acute as the collective submission will concern pricing.
- 7. While the parties can take steps with external legal counsel to mitigate the risks of inappropriate information sharing, this may act as a barrier to the effective use of collective submissions. We would therefore welcome additional CMA guidance on procedures which the parties ought to take in order to comply with their competition law obligations and the CMA should express its willingness to constructively work with the parties in order to ensure that collective submissions can function effectively.