12 July 2024

To: The Competition and Markets Authority ("CMA")

Sub: Comments on the CMA Consultation on Digital markets competition regime guidance

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the draft CMA Consultation on Digital markets competition regime guidance on behalf of the Antitrust Section of the International Bar Association ("IBA"). The Co-chairs and representatives of the Antitrust Section of the IBA would be delighted to discuss the enclosed submission in more detail with the CMA if that would be useful.

Yours sincerely,

INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

COMMENTS ON THE CMA CONSULTATION ON DIGITAL MARKETS COMPETITION

12 JULY 2024

1. INTRODUCTION

1.1 The International Bar Association's ("**IBA**") Antitrust Section ("**Section**") would like to thank the Competition and Markets Authority ("**CMA**") for the opportunity to provide comments on the Consultation on Digital markets competition regime guidance ("**Guidance**"). Such an inclusive process will ensure a robust, effective, and workable framework that benefits all stakeholders.

1.2 The Section congratulates the CMA on the comprehensive nature of the Guidance. The Section offers these submissions for the CMA's consideration at it finalizes the Guidance.

2. ABOUT THE IBA

2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including Argentina, and it has considerable expertise in assisting the global legal community.

2.2 The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, including with international cartel matters and leniency regimes. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.

2.3 The Unilateral Conduct and Behavioural Issues Working Group ("**UCWG**") is responsible for monitoring and commenting on a range of competition issues that arise, *inter alia*, from unilateral conduct and abuse of dominance or misuse of market power as well as cooperative/horizontal (non-cartel) and vertical agreements. It aims to encourage best practice in the ongoing development of international laws in these areas by commenting on consultations on proposed new and reformed legislation.

3. SUBMISSIONS OVERVIEW

3.1 The UCWG is grateful for the opportunity to provide its views on the CMA's Guidance in relation to the implementation and enforcement of the Digital Markets, Competition and Consumers Act (the "**DMCCA**") (the "Guidance").

3.2 Under the DMCCA, the CMA's Digital Markets Unit ("**DMU**") will have the power to designate companies in the digital sector with 'strategic market status' ("**SMS**"). Companies designated as having SMS will be:

(a) required to comply with certain conduct requirements ("**CRs**");

(b) potentially subject to 'pro-competitive interventions' ("**PCIs**"), which can include behavioural remedies, such as publishing information, enabling access on fair and equal terms, and structural remedies, such as divestiture; and

(c) required to notify the CMA of certain transactions (including those below the thresholds providing the CMA with jurisdiction to investigate).

3.3 The DMU will have the ability to impose financial penalties of up to 10% of a company's global turnover, as well as civil penalties on senior managers and the power to seek director disqualifications.

3.4 We have structured our observations in line with the CMA's request in its Consultation Document dated 24 May 2024 to follow the order of the Guidance. We have also included some general observations at the outset.

4. GENERAL OBSERVATIONS

4.1 The DMCCA marks a major reform to UK competition and consumer laws in relation to the regulation of the digital sector. It sits alongside, but is distinct from, the existing regime in the UK (ie, the Competition Act 1998 and the Enterprise Act 2002). It follows moves by other regulators around the world, including the European Union through the Digital Markets Act ("**DMA**"), Germany and Japan, which have introduced additional tools to regulate the digital sector, as well as Australia, Brazil, India, Turkey, which are also in the process of adopting similar sector-specific regulations for the digital sector.

4.2 The DMCCA has the potential to serve an important purpose in providing targeted interventions in the digital sector to the benefit of access seekers and consumers in a manner that delivers faster outcomes than are possible under the existing markets regime (ie, under the Enterprise Act 2002). The DMCCA seeks to take a different path to other regimes (such as the DMA) in providing for a flexible case-by-case approach both to SMS designation and the imposition of remedies that has the potential to deliver greater benefits to access seekers.

4.3 However, that same flexibility also presents significant risks to businesses facing potential SMS designation and consumers in the form of, for example, (i) significant legal uncertainty potentially leading to a chilling effect on innovation, investment and growth, (ii) inappropriate interventions (also known as 'Type II errors'), (iii) the imposition of rules that are in conflict with other regulations to which the affected undertaking is subject (whether in the UK or in other jurisdictions, such as the EU), and (iv) the withdrawal of, or delays to the introduction of, features of digital products that

benefit consumers, as it has already been the case in the EU for several offerings of the Gatekeepers.[1]

4.4 The risks of the regime as outlined above are heightened by the fact that:

(a) the DMCCA does not set out clearly defined legal tests for a finding of SMS, or the imposition of CRs or PCIs; and

(b) appeals against SMS designations and the imposition of CRs and PCIs are limited to judicial review grounds (ie, irrationality, unreasonableness and procedural unfairness) and not appeals on the merits.

Need for effective judicial review

4.5 These two factors, taken together, elevate the importance of ensuring that the procedure that the CMA will follow, and the substantive tests which it will apply, are clearly set down in the Guidance, so that an undertaking can understand the likelihood of regulation, an interested third party can gauge whether to seek regulation and a would-be appellant (whether an affected undertaking or an interested third party) can bring an appeal under Judicial Review to challenge the CMA's decisions to act or not to act.

4.6 A failure to adequately specify the relevant tests in the guidance will likely undermine the ability to effectively advance such appeals. We note that it is for this reason that the guidance is not simply issued by the CMA but must be approved by the relevant Secretary of State. It is thus possible that, should the guidance not be sufficient specific or clear, that the Secretary of State would reject the guidance and require sufficient additions or amendments to ensure that it adequately codifies, and provides clear guardrails, to the CMA's application of the DMCCA via the DMU.

Need for legal certainty

4.7 In light of the above, a recurrent theme in the UCWG's observations on the Guidance relates to the adequacy of the approach to SMS designation and the imposition of CRs and PCIs and the need for more clearly defined tests that the CMA must apply and against which would-be appellants can hold the CMA to account before the Competition Appeals Tribunal ("**CAT**").

4.8 The CMA appears to have drafted its guidance to preserve, rather than clarify, the scope of its discretion to act. The CMA explicitly excludes the application of, for example, market definition or dominance cases, consistent with the approach of the EU's DMA. The CMA also excludes the possibility of adopting a hierarchy of evidence or factors,

[1] *See* Apple's recent decision to delay the launch of AI-powered features in Europe at https://www.reuters.com/technology/artificial-intelligence/apple-delay-launch-ai-powered-features-europe-blames-eu-tech-rules-2024-06-21/ See also a blogpost by Google reporting on the initial impact of the DMA on hotels and consumers, available at https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/

and leaves open the possibility of diverging from its guidance (even if that guidance is expansive in the first place).

4.9 However, while the DMCCA grants the CMA wide discretion regarding the circumstances and nature of interventions (considerably wider than, for example, the DMA) the essential 'quid pro quo' from the perspective of legal certainty is that the Guidance adopted by the CMA must be clear and unambiguous in setting out the procedure that the CMA will follow, including its decision-making, the safeguards it will adopt and – crucially – the analytical frameworks and substantive tests that it will apply when designating firms with SMS and deciding whether to impose CRs and PCIs. Again, we note the constitutional safeguard enshrined in the DMCCA that the Guidance be approved by the Secretary of State and therefore the reasonable expectation that the Guidance will improve upon the DMCCA from the perspective of legal certainty.

4.10 Given that the intention is for the guidance to further codify the CMA's obligations, to enable undertakings to effectively self-assess, engage with the CMA and, if necessary, challenge its decisions before the CAT, we would query whether the fundamental approach in the Guidance is consistent with these objectives. Ultimately, these risks as regards the lack of legal certainty could – if unchecked – result in a chilling effect to growth and innovation in the UK's digital sector.

4.11 While the CMA acknowledges the possibility of departure from its guidance (at paragraph 1.9), which may be necessary in an individual case that presents genuinely novel issues, since this is new regulation in a critical part of the economy, such instances should be kept to the absolute minimum and the CMA should already outline what principles it would follow if the guidance cannot be followed in an individual case.

Double jeopardy

4.12 Separately, we have observed from the experience of the introduction of other regulatory regimes alongside a competition enforcement regime (as exists already in the UK under the Competition Act 1998 and the Enterprise Act 2002) that it is essential to delineate the circumstances when one tool will be used in favour of the other, and to avoid situations of double jeopardy.

4.13 The EU has sought to achieve this to some extent via Recital 86 of the Digital Markets Act,[2] which explicitly provides that (i) the Commission and relevant national authorities should coordinate their enforcement efforts in order to ensure that the principles of proportionality and *ne bis in idem* are respected; and (ii) that the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed correspond to the seriousness of the infringements committed.

4.14 The UK also has some experience of the need for cooperation with concurrent regulators given the powers of some (such as the Financial Conduct Authority or Office of Communication) to also apply competition law. There is also significant risk of

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector.

tension between the DMCCA and other regulations, such as the Information Commissioner's Office ("**ICO**") in relation to the treatment and transmission of data.

4.15 In light of this, we would encourage the CMA to ensure that its guidance sets out a clear framework and clear criteria for establishing when the DMCCA will be used in place of, for example, Chapter II of the Competition Act 1998 and how conflicts between proposed decisions of the DMU and other regulators will be resolved.

International cooperation

4.16 Finally, the DMCCA will come into being alongside other national and supranational legal frameworks (such as in the EU, Germany and Japan), with many others in the pipeline (such as Australia, Brazil, India and Turkey).

4.17 While there may be the need for divergence where the UK-specific market conditions require this, we would encourage the CMA to explicitly provide for international cooperation with key regulators of sector-specific regulation to secure regulatory alignment and minimising material divergence wherever possible.

5. STRATEGIC MARKET STATUS INCLUDING THE CMA'S PROPOSED APPROACH TO (A) SUBSTANTIVE SMS ASSESSMENT AND (B) SMS INVESTIGATION PROCEDURE.

5.1 The DMCCA gives the CMA wide-ranging powers to impose CRs and PCIs (from behavioural commitments up to and including divestitures) on firms designated as SMS.

5.2 This makes the framework through which a firm is so designated of great importance.

SMS designation criteria

5.3 The DMCCA does not itself set out a clear test for establishing which firms qualify as SMS.

5.4 In this regard, the DMCCA misses the opportunity to rely on well-understood and established thresholds for identifying firms that may be subject to *ex ante* or *ex post* intervention. For example, there is an extensive body of case law of what constitutes a dominant position in a correctly defined market, both under UK and EU case law.

5.5 While there is a quantitative requirement in the SMS test that firms should have global turnover of at least £25 billion and UK turnover of £1 billion, the second limb of the SMS test requires that the firm have "substantial and entrenched market power". and a "position of strategic significance" in a digital activity with a link to the UK. The DMU must therefore examine the company's digital activity, whether it has 'substantial and

entrenched' market power, its 'strategic significance' in relation to the digital activity, its UK and global turnover and its UK nexus.

5.6 In that connection we would invite the CMA to provide more clarity on the concept of "UK Nexus" to ensure that any taken by the CMA under the DMCCA does not create a situation where the SMS providers are put in a position where it is impossible to comply with conflicting sector-specific regulations. If the DMCCA remedies apply worldwide, this could prevent the SMS providers from complying with the provisions of the DMA or other regimes.

5.7 Taken together, and for the reasons set out under the general observations (including the limited appeal standard) it is of upmost importance that the Guidance adequately specify the conditions under which the DMU may designate firms as having SMS.

5.8 In this regard, we note – by way of example – paragraph 2.10 of the Guidance, which states that:

"*In identifying a digital activity and considering which of the firm's products it may comprise, the CMA will typically look at how these products are offered and consumed. For example, the CMA may consider how the potential SMS firm structures itself and its business model, how businesses and consumers use and access its products and any interlinkages among them. In practice, this will largely focus on factual information and will* ***not require an assessment of the competitive constraints on the firm****. This is distinct from a formal market definition exercise and the* ***CMA is not required to define a relevant market*** *when assessing SMS*." [emphasis added]

5.9 Given our general observations about the expansive nature of the DMCCA, we consider it essential that the Guidance further specifies the CMA's approach. In contrast, this paragraph gives the CMA very broad discretion in its approach to assessing SMS firms, and downplays the importance of conventional tools, such as contestability, level of competition and market definition. We consider that such an approach reduces legal certainty and makes it more, rather than less, difficult for firms to self-assess the risk of SMS designation and would-be appellants to challenge SMS designations. It is not clear how a determination of whether a firm has "significant market status" can be made without reference to at least some of the elements that are also seen in the analysis of market definition. It is unclear how paragraphs 2.10 et seq. and 2.40-2.52 are consistent given that in 2.10, the guidance is clear that there is no need for market definition, while paragraphs 2.40-2.52 use many concepts that can only properly be assessed if the relevant market has first been defined.

5.10 In any event, if the CMA is to disapply or downplay other established approaches to measuring market power and potential distortive effects, it must clearly specify what approaches it will follow when assessing whether a firm has SMS. This is essential both for legal certainty, rights of defence and the ability of firms designated as having SMS (or third parties seeking to challenge a decision by the CMA not to designate a firm in this way) to effectively challenge the CMA's decision-making before the CAT. Since the CMA has stated that the DMCCA will only apply to some of the largest digital

undertakings, adding further criteria for assessing SMS should not hamper its ability to make the necessary designations.

5.11 Further, in regard to the determination of the 'link to the United Kingdom' in paragraph 2.17 et seq., we welcome the acknowledgement that "*the digital activity under investigation* ***must be linked*** *to the United Kingdom*" [emphasis added]. However, we suggest that the CMA consider making the three criteria listed in 2.18, i.e. that (i) the digital activity has a significant number of UK users; (ii) that the undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity; and (iii) that the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect in the UK are made cumulative rather than alternative. Further we suggest that consideration be given to a safe harbour level of users (below which intervention will be presumed to be unlikely). Both these steps – making the criteria cumulative rather than alternative and adding a safe harbour in terms of users – would improve legal certainty.

5.12 Similarly, the requirement that market power be 'substantial' and 'entrenched' is further developed in paragraphs 2.40 to 2.52 and provides a list of potential qualitative criteria. While stating that the mere holding of market power is insufficient for a finding of SMS (at paragraph 2.40), the Guidance specifically excludes the application of past case law in regard to a finding of dominance (at paragraph 2.45). We are concerned that the lack of reliance on any past case law or analytical tools that have developed over decades to test and assess the extent and effect of dominance, including market definition, together with the desire to undertake highly speculative forward-looking assessments, may lead to unpredictable and erroneous decisions being taken (and in the worst case highly damaging and inappropriate interventions in what are otherwise well-functioning markets).

5.13 Given the difficulties that competition and regulatory authorities have faced in predicting future market developments, we suggest that the CMA take a more cautious approach and consider further specifying, in a sequential manner, the way in which SMS firms will be assessed.

5.14 Furthermore, it is unclear how the CMA will assess 'entrenchment' or group digital activities during designation, which could have wide-ranging implications for SMS firms. We would encourage the CMA to be clearer in the Guidance in this respect.

Definition of 'digital activities'

5.15 Whilst it is understandable given the nature of the digital sector that some flexibility is necessary in futureproofing the definition of what constitutes a 'digital activity', we would encourage the CMA to provide greater certainty as to the approach it will take in this regard.

5.16 For example, we would encourage the CMA to clarify the factors it will take into account when for example grouping activities into a single designation, how and when it will amend a designated activity vis-à-vis re-designation and the level of detail it will

provide in the designation notice (which may serve to enhance legal certainty in future as to the CMA's practice in this regard).

6. CONDUCT REQUIREMENTS INCLUDING THE CMA'S PROPOSED (A) ANALYTICAL APPROACH TO IMPOSING CRS AND (B) PROCEDURE FOR IMPOSING CRS.

6.1 As above, the DMCCA gives the CMA wide-ranging powers to impose CRs on firms designated as SMS.

6.2 However, neither the DMCCA nor the Guidance establishes a clear test that the CMA will apply when determining whether to impose CRs (for example, akin to a finding of a 'substantial lessening of competition' (SLC) under the Enterprise Act 2002 in relation to mergers, a finding of 'adverse effect on competition' (AEC) under the Enterprise Act 2002 in relation to market investigations or a finding of 'significant impediment to competition' (SIEC) under the EUMR in relation to EU mergers). This again gives rise to unpredictability in relation to the CMA's approach and, in light of the JR-only appeals standard, may make it difficult for, on the one hand, SMS firms seeking to challenge the CMA's decision to impose CRs and, on the other, third parties challenging the CMA's decision not to impose CRs, to effectively challenge the CMA's approach. If there is no 'test' that the CMA need impose, it may be difficult if not impossible for a would-be appellant to argue that the CMA has not applied it correctly. More fundamentally, the lack of a distinct 'test' that the CMA must pass to impose CRs makes it difficult for DMCCA-specific jurisprudence or decisional practice to develop.

6.3 Taken together, and for the reasons set out under the general observations (including the limited appeal standard) it is therefore of upmost importance that the Guidance adequately specify the conditions under which the DMU may impose CRs on SMS firms and the involvement – if any – of third parties in that process.

6.4 We would query the relevance of the prioritisation principles to the CMA's decision whether or not to impose CRs (eg at paragraph 3.11), which introduces further uncertainty both for firms facing SMS designation and third parties seeking that same designation. It is unclear how this consideration relates to the CMA's requirement to act in a proportionate manner.

6.5 We would also query whether the framing of the ability to impose CRs in relation to un-regulated activity by reference to the possibility of 'leveraging' (as alluded to in paragraph 3.13 et seq.), is appropriate in circumstances where the CMA has framed its ability to designate services as regulated services extremely broadly. The application of section 20(3)(c) in this manner appears tantamount to enabling the regulation of any service offered by the SMS firm with any actual or potential, direct or indirect link to a digital activity. Again, this does not appear to be further specifying the CMA's approach to applying the DMCCA.

7. PRO-COMPETITION INTERVENTIONS INCLUDING THE CMA'S PROPOSED (A) ANALYTICAL APPROACH TO ASSESSING WHETHER THERE IS AN ADVERSE EFFECT ON

COMPETITION, (B) ANALYTICAL APPROACH TO DESIGNING PCIS AND (C) PROCEDURE FOR PCI INVESTIGATIONS.

7.1 As above, the DMCCA gives the CMA wide-ranging powers to impose PCIs on firms designated as SMS. However, the DMCCA does not establish a clear test that the CMA will apply when determining whether to impose PCIs. Similar to our comments above in relation to the imposition of CRs, and for the reasons set out under the general observations (including the limited appeal standard) it is therefore of upmost importance that the Guidance adequately specify the conditions under which the DMU may impose PCIs on SMS firms.

7.2 We welcome the CMA's recognition that the imposition of PCIs is similar to the approach the CMA has taken in the past in relation to its market investigation regime, including the finding of 'adverse effect on competition' (paragraph 4.3). We consider it essential that the CMA build on existing practice wherever possible in its market investigation regime, including both in relation to procedural frameworks and substantive analysis. We also welcome the inclusion of a list of factors that the CMA will consider in making an AEC finding. We also note that the CMA's market investigation regime provides a number of opportunities for interested third parties and stakeholders to comment and query whether that same provision should be made in regard to the imposition of PCIs.

7.3 We would however query the relevance of a 'reasonable rate of return', which is very subjective and speculative and will differ widely in different economic and investment contexts. We would invite the CMA to provide more clarity in that respect.

7.4 We welcome that the DMCCA provides the potential for exemption where a company can demonstrate that there are net consumer benefits that outweigh any negative consequences and can demonstrate that the conduct in question is indispensable and proportionate to achieve those benefits. However, we would encourage the CMA to provide further details as to the circumstances when this exemption would be available.

8. INVESTIGATORY POWERS

8.1 We would encourage the CMA to explicitly acknowledge the importance of proportionality in weighing the scope and type of investigatory tools deployed, both in relation to any information requests, the decision to seek interviews and any further deployment of investigatory powers, by reference for example to the type of considerations set out at paragraph 3.30.

8.2 In this regard, we would query whether the requirements regarding document retention are consistent with the need for the CMA to act proportionately and would encourage the CMA to look to further tailor such requirements on a case-by-case basis.

8.3 Furthermore, we would encourage the CMA to make explicit how it intends to approach interviews and note the lack of any detail in the Guidance regarding fundamental rights issues in relation to self-incrimination, the treatment and protection of documents and information attracting legal privilege, the treatment of personal and irrelevant

information, as well as the circumstances where the CMA intends to enter premises with or without a warrant in relation to an investigation under the DMCCA. These are issues engaging fundamental rights and should be thoroughly addressed in the Guidance.

8.4 As regards rights of defence and due process, we would encourage the CMA to explain how businesses will be able to challenge inspections.

8.5 Relatedly, we note that, given the highly sensitive nature of information stored digitally by SMS firms, it may be necessary to provide ways for undertakings to make the CMA aware of concerns around sensitivity (e.g., defence projects) so as to avoid a conflict between the actions of the CMA and other Government departments. In this regard, we note with some concern the provisions of paragraph 5.83 of the Guidance, which does not seem appropriate in respect of the digital sector.

9. MONITORING INCLUDING THE CMA'S PROPOSED APPROACH TO (A) MONITORING COMPLIANCE, (B) MONITORING EFFECTIVENESS AND (C) MONITORING WHETHER TO IMPOSE, VARY OR REVOKE COMPETITION REQUIREMENTS.

9.1 We would encourage the CMA to explicitly acknowledge the importance of proportionality in weighing whether to monitor and the extent of any requirement to commence monitoring, by reference for example to the type of considerations set out at paragraph 3.30.

9.2 In this regard, we would encourage the CMA to provide further details regarding the nature of compliance reporting, the approach to participative resolution of concerns and the role of nominated officers.

10. ENFORCEMENT OF COMPETITION REQUIREMENTS INCLUDING THE CMA'S PROPOSED APPROACH TO (A) BREACHES OF COMPETITION REQUIREMENTS AND (B) ENFORCEMENT OF CONDUCT REQUIREMENTS.

10.1 We would encourage the CMA to explicitly acknowledge the importance of proportionality in weighing the extent of any enforcement action, including the need for commitments, by reference for example to the type of considerations set out at paragraph 3.30.

10.2 Consistent with our general observations we would also encourage the CMA to further specify the steps (internal and external) that it intends to follow, including details of expected timings of each step (eg, provisional decisions, oral hearings and evidence) as it does for its other functions (including merger control, market investigations and CA98 investigations) and so provide further clarity to markets regarding the overall timelines of such investigations and enforcement actions.

10.3 As regards the notion of countervailing benefits exemptions, we are concerned with the apparent inconsistency between the removal of the notion of 'indispensability' in the

final draft of the DMCCA and the reference in the Guidance to the relevance of past case law in relation to the notion of 'indispensability'. We would encourage the CMA to clarify this in the final draft guidance. We do not consider that the possibility of individual exemption should be limited to circumstances of indispensability.

11. PENALTIES FOR FAILURE TO COMPLY WITH COMPETITION REQUIREMENTS.

11.1 We would encourage the CMA to explicitly acknowledge the importance of proportionality when calculating penalties, by reference for example to the type of considerations set out at paragraph 3.30.

11.2 Consistent with our general observations we would encourage the CMA to provide further details of expected timings of the steps it will take when calculating penalties, including critically the timing of issuance of the provisional penalty notice and whether that will be before or after the issuance of the provisional findings on substantive aspects of the relevant case.

12. ADMINISTRATION.

12.1 We have no specific observations under this heading.

13. THE CMA'S PROPOSED APPROACH IN RELATION TO THE MERGER REPORTING REQUIREMENT FOR SMS FIRMS.

13.1 We note at present that the Guidance anticipates that the duty to report applies to all mergers carried out by SMS firms, including in relation to non-digital activities, with some requirement for a UK nexus.

13.2 We would query the proportionality of this requirement; including in circumstances where the relevant firm is active in a broad array of activities entirely unrelated to the relevant digital service or the UK (for example, multi-national corporations, private equity funds with many hundreds of portfolio companies across many different countries). We would encourage the CMA to consider providing in its guidance for the possibility that the requirement to notify mergers could be limited to (i) those involving mergers or acquisitions of a firm that is active in the digital sector or the digital sector the SMS firm is designated and (ii) those involving targets which have employees,

assets or revenues in the UK or have concrete plans to enter the UK in the next 2-3 years.

13.3 We note that the CMA could tailor the requirement on a case-by-case basis so as to limit the burden on undertakings of making many notifications that will be of no tangible utility to the CMA or businesses or consumers.

13.4 Last but not least, we note that the DMCCA provides for a stand-still requirement for DMCCA notifications, including a 5 working day waiting period after the submission of the DMCCA notice, and another 5 working day review period. Under the proposed rules, if the CMA rejects the filing as incomplete, the SMS will have to make a new filing, where the 5 working day review period starts afresh. This is in stark contrast with the DMA, which only imposes a prior notification requirement. The imposition of a standstill together with the ability of the CMA to reject filings as incomplete would jeopardize many no-issues transactions by putting SMS firms at a competitive disadvantage compared to private equity firms or other financial acquirers which will not have this constraint.

13.5 In light of the above, we suggest that the CMA gives consideration to a mere notice-only prior notification requirement, just like the one that currently applies under Article 14 of the DMA, in order not to jeopardize the vast majority of no-issues transactions. For the small minority of transactions that might raise concerns, the CMA can always impose an initial enforcement order, as is the case under the general merger control regime in the UK.

14. CONCLUSION

14.1 We trust these observations will be helpful as the CMA moves towards finalising its guidance for approval by the Secretary of State, which is an essential constitutional safeguard enshrined in the DMCCA.

14.2 If the CMA would like to discuss the points raised in this submission, please contact the Section Officer identified in the cover letter.