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**APPLE'S RESPONSE TO THE  
CMA'S DRAFT GUIDANCE ON THE DIGITAL MARKETS  
COMPETITION REGIME SET OUT IN THE DIGITAL MARKETS,  
COMPETITION AND CONSUMERS ACT 2024 OF 24 MAY 2024**

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12 July 2024

Apple appreciates the opportunity to comment on "*CMA194con DRAFT Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024*" dated 24 May 2024 (the "draft guidance").

The Digital Markets, Competition and Consumers Act 2024 grants the CMA expansive powers to regulate and intervene in the business models of SMS firms. This includes broad discretion to target various aspects of those business models, how and when to intervene, and whether to revise interventions on an ongoing basis. Apple understands that the DMCC regime is new, and acknowledges the CMA's desire for flexibility, particularly in the early stages of enforcement as it continues to develop its policy. However, Apple believes that all stakeholders, the CMA included, would benefit from more transparency and certainty at the outset of the Act's implementation. Providing more detailed information and guidance will support compliance and enhance the overall operation of the regime.

While the draft guidance contains some helpful information and direction on how the CMA plans to use its new powers, Apple encourages the CMA to expand significantly on information and direction in the final guidance. In line with the principles of good regulation and in the spirit of cooperation, this response provides feedback on areas where further elaboration would be beneficial to all market participants. This would provide greater insight into the CMA's intended approach and lay a solid foundation for participative and collaborative regulation.

This response is divided into two parts:

- **Part I: Overarching themes** applicable across chapters of the draft guidance.
- **Part II: Chapter by chapter comments** on specific aspects of the proposals, structured in accordance with the chapter order in the draft guidance.

Apple supports the CMA's desire to operate the DMCC regime in a participatory manner. In that spirit, Apple would welcome the opportunity to discuss these points in greater detail.

### **Part I: Overarching themes**

Apple has identified three key themes across the draft guidance that it urges the CMA to prioritize as it further develops its planned approach. These are: (i) regulatory certainty and stability; (ii) transparency; and (iii) proportionality.

#### **1. Regulatory certainty and stability**

The CMA has stated that the positive outcomes pursued under this regime are that "*people can be confident they are getting great choices and fair deals; that competitive, fair-dealing businesses can innovate and thrive; and that dynamic competition stimulates investment and competitive innovation, driving economic growth and productivity*".<sup>1</sup>

Apple agrees that these are desirable market outcomes. Achieving them requires a regulatory approach grounded in the market dynamics that drive innovation and consumer benefits. As the Government has acknowledged, regulation is not an end in of itself, but should position

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<sup>1</sup> Overview of the CMA's provisional approach to implement the new Digital Markets competition regime – January 2024.

regulators as “enablers” for businesses.<sup>2</sup> Key elements of such an approach are regulatory certainty and stability.

Incumbent firms who may be subject to regulation need a clear understanding of the DMCC’s regulatory framework and how it will be applied by the DMU. Firms must have confidence that the regulator will provide timely and clear feedback on compliance measures (both proposed and implemented). Clarity and engagement of this nature is vital for implementing informed compliance measures and engaging effectively with other market participants and end-users. Challenger firms also require regulatory certainty so that they understand the affordances provided by the regulation and to engage constructively with incumbent firms and other stakeholders. And both require stability – neither incumbent nor challenger firms can afford to invest and innovate in products or services that are at risk of being subject to ever shifting regulatory burdens and amendments. Stability likewise affords all businesses with a greater incentive to participate in and cooperate with regulatory measures, and it helps constrain the chilling effect that any regulatory interventions may have on innovation. Greater certainty also benefits the CMA by enabling more robust compliance programs and improved ability to identify effective interventions.

Apple suggests that increased certainty and assurances in the final guidance would be particularly helpful with respect to the following elements of the regime:

*The exercise of the CMA’s discretion.* The CMA has very broad discretion under the regime, including decisions on whether and when to open a Strategic Market Status (“SMS”) investigation, defining what constitutes a relevant “digital activity”, and whether to extend requirements to non-designated activities.<sup>3</sup> The draft guidance provides little indication of how the CMA plans to exercise its discretion across designated and non-designated activities, leaving firms uncertain about potential overlapping and ongoing investigations and the risk that requirements will be imposed on multiple activities. Furthermore, the draft guidance lacks clarity on how the CMA will decide between imposing conduct requirements or pro-competitive interventions, making it even more difficult for firms to make informed business decisions that consider their regulatory obligations. To facilitate effective participation and compliance, more detailed guidance on the CMA’s likely use of its discretion is essential.

*The application of legal tests.* Central concepts of the new regime, such as SMS, are similar to longstanding competition law principles with a well-established body of precedent. However, the guidance provides that the CMA may depart from these precedents.<sup>4</sup> This creates uncertainty for firms, as they cannot rely on analogous precedents to make compliance decisions confidently. To ensure a sound approach to regulation and avoid undue uncertainty

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<sup>2</sup> “Smarter regulation: Delivering a regulatory environment for innovation, investment and growth”, Department for Business & Trade, May 2024.

<sup>3</sup> Similarly, with respect to the basis for launching a pro-competitive intervention investigation, the CMA retains maximum flexibility to open an investigation based on any evidence it sees fit, which provides SMS firms with little certainty about the circumstances in which the CMA will open an investigation. Draft Guidance, para 4.43.

<sup>4</sup> See, for example, footnote 31, where the guidance discusses dominance case law in relation to the concept of “substantial and entrenched market power”. Apple notes, however, the requirement that SMS firms must meet to show that benefits could not be realised without the conduct under condition 3 of the Consumer Benefits Exemption (CBE), where the guidance states at paragraph 7.68 that this imposes a standard akin to the ‘indispensability’ test in section 9(1)(b) of the CA98 and that the CMA will have regard to the interpretation of that test when applying condition.

for all impacted by the new regulatory regime, the CMA should provide additional guidance on the relationship between new and existing principles, tests and precedents.

*The assessment of effects.* The draft guidance provides that the CMA will not need to assess the effects of any conduct requirement or pro-competitive intervention with precision, conducting assessments “in the round” instead.<sup>5</sup> This lack of precision raises concerns about the CMA’s ability to demonstrate that it is achieving its intended positive outcomes, and may also conflict with the general administrative law duty to give sufficient reasons for a decision. Transparency is vital in the early years of the new regime. Uncertainty can hinder market participants’ ability to make informed business decisions that may prevent the need for future conduct requirements — an inefficient outcome for market participants, the CMA, and consumers. Given indications that the CMA may depart from existing case law and precedent, it is particularly important for the CMA to provide detailed reasoning for its findings.

The CMA’s flexibility with respect to evidence and fact findings also contrasts with the requirement that countervailing benefits have to be identified by SMS firms as early as practicable, supported by evidence, with a clear explanation of the nature and scope of benefit.<sup>6</sup> Greater guidance on the evidential basis for the CMA’s assessments, allowing parties to supplement the record with countervailing benefits, and a consistent approach across the regime would be beneficial.

*The testing of appropriate remedies.* The power given to the CMA to test and trial different remedies could provide some benefits in reaching a regulatory outcome that works for all participants, but without clearly defined limitations, it also poses risks of serious business disruption and adverse implications for SMS firms and other stakeholders. More guidance is necessary as to how the CMA will consider practical issues such as implementation periods, particularly for directive conduct requirements. This includes addressing the engineering and technical work that may be required by the SMS firms and by third parties, the challenges of different business models and technical frameworks, and the potential disruption to other market participants that the legislation is intended to protect.

## 2. Transparency

The draft guidance provides that “[t]ransparency is 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.”<sup>7</sup> Apple fully agrees with this stance and believes that transparency is crucial for the effective functioning of, and trust in, the regime for all participants. Such trust will be critical to developing the CMA’s intended participative approach.

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<sup>5</sup> See, for example, the statement at paragraph 3.32 (conduct requirements) that “The CMA will not typically seek to quantify these effects precisely, but will consider their magnitude in the round, having regard, as relevant and appropriate in each case, to the quantitative and/or qualitative evidence available.” or at paragraph 4.35(b) (pro-competitive interventions) where the CMA states that it will “consider those effects in the round, rather than seeking necessarily to quantify them precisely”.

<sup>6</sup> Draft Guidance, para 4.40.

<sup>7</sup> See, paragraph 9.17 and more broadly the discussion of transparency at paragraphs 9.16 to 9.22. In particular, paragraph 9.22 states that the CMA will engage with a wide range of stakeholders to inform its decision-making. It also states that “[t]his is likely to involve other transparency mechanisms as the regime develops.”

Areas of the regime where transparency will be of central importance, including by expanding on the existing draft guidance, include:

*Prioritization.* The guidance frequently mentions the CMA's prioritization principles, but these principles are broadly framed and not designed for the kinds of fast-moving technological markets covered by the new regime. As the CMA could choose to prioritize action based on various factors such as the nature of the activity, the market structure or end-user base, firms have very little ability to predict when and how the regime will apply regulation. Greater transparency on how the CMA prioritizes and focuses its regulatory activities, along with opportunities for additional consultation would address this issue considerably. This would also help the CMA to demonstrate how it aims to achieve the intended positive outcomes. If the CMA opts not to include such information in the final guidance, to supplement the general prioritization principles, it could publish on its website a statement providing information on the CMA's short- and medium-term areas of focus and likely intervention.

*Engagement with SMS and other firms.* Transparency with respect to how the CMA intends to interact with and take account of third-party complaints would also reassure stakeholders about the CMA's commitment to a participative regime and help to build trust in the new Act from the outset. This includes interactions before an investigation is launched, during the investigative and remedial stages, and during regular "compliance" monitoring. With respect to remediation in particular, transparency will play a key role in aligning expectations between the CMA and SMS firms. The CMA must clearly state its expectations, and SMS firms should openly discuss what is technically feasible and the challenges involved, both for remedies being tested and for proposed final remedies. The guidance should also explain what market participants can expect in terms of ongoing engagement with the CMA, including detail on the team or teams that will be involved and how often such engagement is likely to take place. In addition, given the important role played by the CMA Board and Committees of the Board in the operation of the Act, it would increase trust in the regime if the final guidance includes more detail about whether market participants can engage directly with these bodies regarding the regime, and if so, what form such engagement could take.

*Response and consultation periods.* Throughout the draft guidance the CMA states that the timeframes to respond to investigatory processes, consultations and various reporting obligations will depend on the urgency of the issue under consideration, administrative timetables and statutory time limits. However, there is limited information on the likely duration for consultations on the CMA's provisional decisions. The CMA's approach, which allows maximum flexibility with no minimum consultation period is in stark contrast with mergers, markets, and antitrust regimes where discrete consultation periods are specified in statute or relevant guidance. This creates uncertainty for market participants. Therefore, the CMA should plan ahead and provide maximum transparency about the likely timeframes that will need to be adhered to.

### **3. Proportionality**

Paragraph 1.6 of the draft guidance acknowledges that the CMA must perform all of its functions and make decisions in a procedurally fair manner, adhering to administrative law standards. Additionally, the CMA is required to exercise its powers legally, reasonably, for a

proper purpose, and in a proportionate manner. Apple agrees that these principles are essential for building trust in the regime among all stakeholders, from SMS firms to end users.

As set out above, the CMA is afforded considerable discretion in implementing the regime, and there is currently limited guidance on key elements. This uncertainty can lead to concerns that the CMA's approach may impose unnecessary or disproportionate burdens on SMS firms, potentially stifling incentives to invest in, and directing resources away from creating, innovative products and services for UK users. Examples highlighted above include the mismatch between the evidential burdens on the CMA and SMS firms when it comes to the assessment of the effect of conduct and the uncertainty surrounding the designation process and application of remedies.

Other areas where the draft guidance could provide more assurance that the CMA will minimize the administrative burden on SMS firms and exercise its powers proportionately include the CMA's expansive monitoring powers and related reporting requirements for SMS firms. This is particularly important given the possibility of multiple designations and the frequency and extent of compliance reporting obligations.

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## **Part II: Chapter by chapter comments**

### **Chapter 1: Introduction**

Apple has little comment on the introductory chapter, other than to note that the key themes identified above with respect to regulatory certainty, transparency and proportionality apply. For example:

Paragraph 1.6 could be expanded upon to refer to additional administrative law duties that apply to the CMA in the exercise of its function.<sup>8</sup>

Paragraph 1.7 of the draft guidance states that the CMA will "*have regard to this guidance*" but that it "*will apply this guidance flexibly and may depart from the approach described where there is an appropriate and reasonable justification for doing so.*" To ensure that market participants have confidence and trust in the digital markets regime, if the CMA chooses to retain this broad discretion to depart from its own guidance, further information on the circumstances in which this may be likely to occur should be provided. The CMA should at a minimum commit to explaining publicly its reasoning for doing so in any given instance.

### **Chapter 2: Strategic Market Status**

At paragraph 2.1 of the draft guidance, the CMA acknowledges that the Strategic Market Status ("SMS") designation regime is central to the regulatory framework. It is crucial that the SMS designation process be transparent and afford SMS firms with sufficient predictability. This will ensure that firms clearly understand the implications of their designation from the outset and can operate their businesses thoughtfully and carefully, with a reasonable level of

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<sup>8</sup> See comment regarding paragraph 1.6 in Part I.

certainty that they will not be required to make multiple, potentially irreversible business changes in the short term.

There are a number of core areas where the draft guidance could be further developed to provide potential SMS firms with a better understanding of how the CMA intends to designate SMS firms:

- The CMA acknowledges that the concept of “digital activity” sets the scope for the SMS designation,<sup>9</sup> therefore highlighting its critical importance. Yet the CMA affords itself maximum discretion – *“Identifying digital activities is a case-specific assessment and the CMA may vary its approach between investigations depending on the particular circumstances of a case.”*<sup>10</sup> At a minimum, further guidance would be helpful to understand how the CMA considers the relationship between a digital activity and any assessment of competitive constraints on the firm or market definition.
- The draft guidance provides no additional information on how the CMA will exercise its discretion to group digital activities. Paragraph 2.13 repeats the wording of Section 3(3) of the Act. Paragraph 2.14 states that *“The CMA will decide on the facts of each case whether or not to treat two or more of the potential SMS firm’s digital activities and the products within those as a single digital activity for designation purposes...”*<sup>11</sup> Again, this provides no certainty and creates instability for potential SMS firms.
- The draft guidance states that because the concept of *“substantial and entrenched market power”* is a new concept for the purposes of the DMCC regime, the CMA will *“not typically”* seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment,<sup>12</sup> but at the same time, the CMA *“may”* have regard to the underlying evidence and analysis in CA98 cases to the extent and persistence of the potential SMS firm’s market power.<sup>13</sup> As set out in Part I, to provide the necessary regulatory certainty and ensure a proportionate approach is taken, the CMA should provide further guidance on the circumstances in which it is likely to either depart from or use analogous precedent, and commit to consistency of approach across the regime.
- Finally, with respect to the other requirement for SMS designation, a position of strategic significance, the draft guidance provides a wide range of metrics that may be used but no guidance on how the CMA will choose between them or what may be sufficient to fulfil the criteria.

### Chapter 3: Conduct Requirements

The CMA’s power to impose conduct requirements enables it to impose significant changes to the operations of SMS firms. Although the CMA may only impose conduct requirements of a permitted type, the list of permitted types is extremely broad. Paragraph 3.6 reiterates that the CMA may only impose a conduct requirement(s) if it deems them proportionate for one or more of the following three objectives, having regard to what the conduct requirement(s)

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<sup>9</sup> Draft Guidance, para 2.4.

<sup>10</sup> Draft Guidance, para 2.11.

<sup>11</sup> Draft Guidance, para 2.14.

<sup>12</sup> Draft Guidance, para 2.45.

<sup>13</sup> Draft Guidance, footnote 31.

is intended to achieve: (a) fair dealing; (b) open choices; and (c) trust and transparency. On their own, these concepts are vague and the draft guidance provides little additional clarity as to what may be permitted. This, coupled with the lack of clarity on the CMA's proposed approach to assessing effects (referred to in Part I above), provides little insight for incumbent firms regarding how the regime is likely to be applied. To ensure greater certainty, transparency and proportionality, the guidance should offer more detailed explanations on how the CMA interprets and intends to apply these provisions.

The power in section 20(3)(c) of the Act for the CMA to impose conduct requirements on non-designated activities creates the possibility that the overall scope of the regulations under the DMCC could be significantly expanded outside of the boundaries created by the 'digital activity', which is the natural focus for such regulation. If it does so, the scope of the effective impact of SMS designation would be much more significant than simply in relation to the core 'digital activity', greatly increasing the related costs of designation. The draft guidance provides a single paragraph on how the CMA will apply this power, which it states will be centred "*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).*"<sup>14</sup> The only examples offered are where conduct may increase or prevent the lowering of barriers to entry or expansion, such as where non-designated activity "redirects" to the relevant digital activity. These indicia offer little clarity on how the CMA will exercise this power, particularly because the draft guidance lacks an explanation of how any assessment of barriers will relate to the CMA's SMS investigation. For example, it is unclear whether barriers will be assessed on a static or dynamic basis. If assessed dynamically, the guidance does not specify how the CMA will ensure consistency in terms of evidence and approach with its 5-year-forward-looking SMS assessment.

Furthermore, the draft guidance does not include any materiality threshold or limiting factors for the exercise of this power, which is crucial given that in principle the use of this power represents the outermost reach of the regime. Given the extensive reach of this power, it is important that the final guidance provides additional detail on how the CMA will exercise it in a targeted and proportionate way. The final guidance should recognise and take due account of the fact that the CMA will not have gained evidence about the non-designated activity in any SMS investigation and parties will not have had the opportunity to test it.

The final guidance should also recognise that conduct is likely to have different effects (i.e. less propensity for harm to competition) in the absence of market power – and market power should not be assumed in the absence of an SMS designation. Indeed, outside of an SMS-designated activity, a firm's market position may be better characterized as challenger, rather than incumbent, and it is important that the operation of the regime reflects the reality of competitive conditions. The final guidance should demonstrably reflect a consideration of these issues.

In terms of the steps that the CMA will carry out when designing a conduct requirement, especially those that could impact platform security, performance or user privacy, it is crucial

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<sup>14</sup> Draft Guidance, para 3.14.



to avoid unintended consequences and ensure proportionality. This consideration should be further detailed in the final guidance. Assessing the effects of proposed interventions on security, performance and privacy, and balancing these against the CMA's primary objectives, will often be a key strategic judgement for the regime's decision-makers. Therefore, it is essential to carry out these assessments robustly using the best evidence and expertise available. To the extent that the CMA needs to source expert external advice in this respect, the guidance should specify when the CMA is likely to do so and what access to information market participants should expect. The final guidance should elaborate on how the CMA will weigh privacy, performance and security considerations in its overall judgements, and include clear transparency requirements in this regard. Neglecting these factors could lead to negative impacts on security, privacy and performance and reduce overall choice and trust in the regime.

When considering conduct requirements relating to data usage, the CMA should also address user data protection through measures like data tracking limitations and other privacy safeguards. Similarly, when considering notice and transparency requirements imposed on SMS firms, the CMA must consider security imperatives to prevent exposing users to threats from malicious actors.

To ensure transparency and a participative approach with respect to conduct requirements consultations, it would be helpful if the CMA could provide further guidance on important process issues, such as:

- Whether the CMA will be required to consult on multiple proposed options simultaneously;
- Whether the CMA will be required to seek views on whether outcome or conducted focused conduct requirements are more appropriate;
- The circumstances in which bilateral engagement is more appropriate than multilateral engagement with stakeholders;
- Whether and how firms are expected to take into account the CMA's "interpretative notes" when engaging in compliance efforts and whether these will be published; and
- How the CMA will balance the rights of undertakings to understand the basis for its concerns, where its evidence base may rely on information from complainants, some of whom may be anonymous. SMS firms must have the ability to address unfounded assertions and ensure that the CMA is basing its concerns on accurate information.

Paragraph 6.79 refers to the duty on the CMA in the Act to consider on an ongoing basis whether to vary or revoke a conduct requirement. This would follow a similar process to the making of a conduct requirement, including the assessment of effectiveness and proportionality. It would be helpful if the CMA would provide an indication in the guidance of how often it would expect to revisit conduct requirements and what level of engagement SMS levels can expect in this regard.

#### **Chapter 4: Pro-Competitive Interventions**

Paragraphs 4.4 to 4.19 of the draft guidance outline how the CMA will assess whether there is an adverse effect on competition ("AEC"). It would be helpful if the CMA could provide more detail about the threshold test it plans to use to determine whether a digital activity is having an AEC. This additional detail will help SMS firms better understand and evaluate the CMA's

decisions. This need for clarity is especially important because the CMA can consider external factors to the digital activity in question when assessing an AEC.

Paragraphs 4.33 and 4.65 to 4.69 address the testing or trialling of PCIs in order to gain evidence on the effectiveness of different options. To avoid creating instability for market participants, in addition to the factors listed at paragraph 4.67 that the CMA must take into account in deciding whether to impose requirements on a trial basis, it should also have regard to the time and resources that an SMS firm will need to engage in order to conduct the trial, as well as any third parties dependant on the digital activities and end users.

Paragraph 4.52 addresses the requirement for SMS firms to engage with the CMA on remedies throughout the PCI investigation, although the CMA has a further four months to assess remedies after issuing the PCI decision. Given the fast-paced nature of digital markets, significant changes can occur in as little as four months. Placing SMS firms on a separate and earlier timeline from the CMA risks forcing them to address concerns that may ultimately prove unfounded, directing resources away from other areas of important work. The final guidance should recognise that the CMA must exercise this requirement proportionately to minimize unnecessary and disruptive work.

Given the CMA's desire to "*operate the regime in a transparent and participative manner*",<sup>15</sup> the final guidance could provide useful clarification regarding the type of engagement the CMA will undertake on the design and terms of the pro-competitive intervention in advance of a public consultation, including whether it will be multilateral. It would also be important from a transparency perspective, to know whether the CMA will provide the SMS firm with the evidence that it has relied on to open a PCI investigation.

## Chapter 5: Investigatory Powers

The investigatory powers granted to the CMA under the Act are extensive and far reaching. Given this, Apple welcomes the acknowledgement by the CMA that it will adopt a proportionate approach to information gathering and related powers. This is particularly important given the significant burdens the exercise of the CMA's investigatory powers could impose on SMS firms and the potential negative effects on third parties who participate in the regime. Certainty in the new regime would be increased if the CMA could state in the final guidance what it "will" do in this regard (or at a minimum is "likely" to do), rather than what it "may" do (for example, with respect to the statement that the CMA *may* consider the cost and impacts, in terms of time and resources, both for the CMA and the firm subject to the requirement to vary its usual conduct).<sup>16</sup> In this regard, to ensure that notice recipients can properly assess whether the CMA is exercising its powers properly, the final guidance should require the CMA to clearly state the purpose for which it requires the information and why it considers the information relevant to a digital markets function.

Regarding the CMA's power to require a recipient to "*obtain or generate information*" or to "*create, gather, aggregate or combine*" information, Apple supports the suggestion in paragraph 5.17 of the draft guidance that where practicable and appropriate to do so, the CMA may send an information notice in draft for discussion with the party. Apple would

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<sup>15</sup> Draft Guidance, para 9.22.

<sup>16</sup> Draft Guidance, para 5.15(c).

suggest that this should be the default position and that the CMA be required to use this power reasonably and proportionately, as it will help to ensure that notices are feasible and practicable, particularly within tight statutory timeframes and in circumstances where the CMA may be considering whether to require firms to generate information that they do not normally hold.

With respect to reports by skilled persons,<sup>17</sup> the following points should be addressed further in the final guidance:

- Objective benchmarks that address best practices, evidence requirements and reports of skilled persons, particularly in cases where the CMA requires the SMS firm to appoint the skilled person;
- Information on whether the CMA will develop a panel of skilled persons or a list of pre-approved skilled persons; and
- A requirement that the SMS firm be given access to the report the skilled person provides to the CMA and information regarding the SMS firm's ability to comment on the report, including the skilled person's methodology.

Paragraphs 5.75 to 5.80 address the "duty to preserve information", in circumstances where that person: (i) knows or suspects that a breach investigation or a PCI investigation is being, or is likely to be, carried out; (ii) knows that the firm is the subject of an initial SMS investigation; (iii) knows that the firm is required to produce a compliance report or is the subject of a further SMS investigation; or (iv) knows or suspects that the CMA is assisting or is likely to assist an overseas regulator in carrying out their functions. The CMA states that it will typically consider a person to be on notice that the duty will apply where "*the CMA has delivered any form of notification, orally or in writing, or if the person has received information through any other forum indicating that one of the circumstances may apply.*" Given the importance of this duty, the final guidance should clarify what is meant by "*through any other forum*".

## Chapter 6: Monitoring

The CMA is granted expansive monitoring powers under the Act, which include overseeing new and emerging risks, initiating new SMS investigations, imposing new remedies, and ensuring SMS firms comply with "competition requirements". Apple appreciates the CMA's initiative to outline how it will use these powers in its guidance and highlights several areas where further detail would be beneficial. However, Apple is concerned that there is insufficient information on the concept of monitoring for "effectiveness", and the related potential for new or varied interventions invites substantial uncertainty and market instability. The final guidance should provide greater detail on the standards of effectiveness monitoring and the outcomes that may flow from it. Without such standards, incentives to invest for UK users may be substantially reduced.

Paragraph 6.10 of the draft guidance provides a broad but non-exhaustive list of the sources of information the CMA will use in carrying out its monitoring activities. This includes information that market participants, including SMS firms, may choose to submit. It would be helpful if the guidance could indicate which sources the CMA is more likely to rely on as part of its monitoring activities and to explain how it will weigh these sources.

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<sup>17</sup> Addressed in para 5.65 *et seq.* of the Draft Guidance.

Paragraph 6.14 also discusses the CMA's discretion in determining the appropriate response to submissions received, and the factors it considers when exercising that discretion. To ensure fairness and transparency, the CMA should keep SMS firms informed of information it receives, the actions it is considering based on that information, and its final decisions regarding the appropriate course of action.

Paragraphs 6.15 to 6.19 address how the CMA will handle complaints during its monitoring activities, including responses to complaints. However, the guidance does not specify whether and how SMS firms will be informed about complaints by third parties. Given the importance of complaints as a source of information, procedural fairness requires that SMS firms be given adequate opportunities to examine and provide relevant information to the CMA, ensuring that the CMA proceeds on the basis of a comprehensive and accurate understanding of the relevant factual circumstances.

As stated in Part I above, it is important for SMS firms to understand how the CMA will exercise its reporting requirements in a proportionate manner, particularly where a firm is subject to multiple measures under the regime. The "*Compliance reporting notice*" section of the draft guidance, should include a requirement that, in deciding on the requirements of a compliance reporting notice, the CMA have regard to the SMS firm's existing reporting obligations.

## **Chapter 7: Enforcement of competition requirements**

This chapter raises some concerns with respect to the evidential burden on SMS firms and the procedural rights and protections that they must be afforded, including with respect to the CBE.

With respect to the disclosure of evidence, detailed at paragraphs 7.28 *et seq.* of the draft guidance, it would be beneficial for SMS firms if the CMA confirms that when it deems it appropriate to only disclose the "gist" of particular documents or a category of documents, it will provide a comprehensive list of the evidence it holds. This should include the option for SMS firms to request the underlying documents themselves (or non-confidential versions or summaries), to ensure they can properly exercise their rights of defence.

The draft guidance provides at paragraph 7.62 that "*when formulating and imposing a CR, the CMA would expect to take into account loss, if the given CR were imposed, of any benefits to users or potential users that may be generated by conduct which the CR is directed at. As such, where a firm seeks later to rely on the CBE in a conduct investigation, and benefits of conduct have already been taken into account by the CMA, the CMA will expect the firm to provide new evidence going beyond any previous submissions or representations it has made on the relevant matters*". This approach assumes ("would expect") that the consumer benefits have been adequately considered when determining whether to impose a CR. For procedural fairness and proportionality, if there is disagreement between the SMS firm and the CMA, it would be unreasonable for the CMA to "double discount" the evidence provided by the SMS firms regarding those benefits. Confirmation that this is not intended would be appreciated.

Confirmation in the final guidance of the evidence that will be provided to SMS firms during the initial assessment of whether to open an investigation would also be welcome.

## Chapter 8: Penalties

Chapter 8 draws attention to the CMA's forthcoming revision to its existing Penalties Guidance.<sup>18</sup> It would be helpful to understand whether the CMA expects the upcoming Penalties Guidance to significantly supersede the content in this chapter. If so, will the CMA rely on the new Penalties Guidance or amend the DMCC guidance accordingly.

Paragraph 8.33 of the draft guidance states that *"[e]ffective deterrence requires that a penalty imposed materially exceeds rather than simply neutralises any likely or potential gains from a failure to comply such that there is a strong economic incentive to comply."* Gains are not limited to those that may accrue in areas or activities associated with the failure. To ensure that undertakings have a meaningful opportunity to comment on a provisional penalty notice, the CMA should provide a detailed assessment of gains, broken down into those related to the failure and those that are not. Further guidance on how the CMA intends to do this and the process for review by SMS firms and opportunity for consultation would be helpful.

Paragraph 8.48 of the draft guidance states that undertakings will be given a *"reasonable opportunity"* to make written representations on the provisional penalty notice to the CMA, and that such a period *"will be determined on a case-by-case basis having regard to the nature of the failure to comply and the constraints of any relevant statutory or administrative timetable"*. Given the CMA's broad powers to impose significant fines and the relevance of non-designated business areas to the calculation, the final guidance should have some indication of the minimum time period it will afford firms, the record that it will create in determining appropriate fine amounts, and the additional factors it will take into account in determining the penalty.

## Chapter 9: Administration

The administration chapter covers a broad range of topics, including extension periods, consultation and publication of statements, transparency, the duty of expedition, and coordination with relevant regulators. Apple welcomes the CMA's willingness to elaborate on these key topics in the guidance and offers the following suggestions for the final guidance.

With respect to consultations and the publication of statements,<sup>19</sup> the CMA again refers to existing external guidance (in this case the government's "Consultation Principles") when considering the length of a consultation period. Given the much broader and more generic nature of those principles, it would be helpful for the final guidance to provide information on any industry-specific factors that the CMA will take into account. Further, the draft guidance states that the CMA will give relevant parties advanced notice of the consultation timetable "where appropriate" – the final guidance should make this the default position, as it is difficult to envisage a situation in which the CMA does not know in advance that it will be subject to its duty to consult.

Paragraph 9.14 states that the CMA may use a range of non-written methods to solicit responses to consultations, such as one-to-one telephone calls and videoconferences. The

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<sup>18</sup> Draft Guidance, footnote 536.

<sup>19</sup> Paragraphs 9.10 to 9.15.

final guidance should provide information on the steps that the CMA will take to ensure that it makes and retains comprehensive written records of such interactions, which, like written responses, also clearly indicate which information is confidential and provide parties with an opportunity to correct for accuracy.

Paragraphs 9.23 to 9.26 address the CMA's "duty of expedition", which derives from the requirement in section 327 of the Act for the CMA to take decisions "as soon as reasonably practicable". The draft guidance states that "*there will be circumstances where the CMA progresses its investigations more quickly than general guidance on timelines or statutory deadlines may indicate*", without providing an indication of what those circumstances are or may include. It would be helpful if the CMA could provide additional guidance in this regard.

With respect to engagement with other regulators, the guidance at paragraph 9.38 provides for two methods of consultation – public consultation or bilateral engagement. The former is clearly preferable from a transparency perspective. Apple would welcome further clarification in the final guidance as to the circumstances in which bilateral engagement would be preferred and what steps the CMA intends to take to ensure sufficient transparency for market participants about such engagement.

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