

RESPONSE TO CMA CONSULTATION: DIGITAL MARKETS COMPETITION REGIME GUIDANCE

Baker McKenzie¹ welcomes the opportunity to respond to the CMA's consultation on the Digital Markets Competition Regime Guidance ("the DMCC Guidance"). We comment in our capacity as an international law firm on behalf of the firm and no individual client. Our comments are based on the experience of advising clients on UK competition law. We confirm that this response does not contain any confidential information and we are happy for it to be published on the Government website.

1. EXECUTIVE SUMMARY

- 1.1 The Digital Markets, Competition and Consumers Act ("DMCCA") introduces new digital sector regulation - in addition to expanding the UK Competition and Markets Authority's ("CMA") consumer protection powers and introducing significant reform of the UK competition regime.
- 1.2 The DMCCA and the accompanying new digital markets regime could serve an important purpose in providing targeted interventions in the digital sector that benefit access seekers and consumers in a manner that delivers faster outcomes, more choice and transparency than which are possible under the existing markets regime (i.e., under the Enterprise Act 2002 ("EA 2002")).
- 1.3 The DMCC Guidance provides the CMA with wide-reaching and flexible powers. We appreciate that digital markets are fast-paced and, for the CMA to appropriately regulate challenges that arise in this space, an agile regime that makes interventions on a case-by-case basis is key. However, flexibility in application should be balanced against clear guidelines and practices that ensure legal certainty and predictability. Lack of clarity could potentially lead to a chilling effect on innovation, investment and growth. To this end, market participants would benefit from the CMA providing a clear set of circumstances where the provisions of the DMCCA apply. It is also important that the DMCC Guidance provides effective guardrails to the CMA's powers in relation to the conduct of SMS firms and their activities.
- 1.4 We encourage the CMA to provide further clarity on certain aspects of the procedural and substantive framework of the new regime to encourage active participation with relevant stakeholders and to clarify to whom the new regime will apply. We note that the CMA has identified areas where it would engage with a wider range of stakeholders. We welcome this and would recommend that any such engagement takes place early in the process. This would enable the CMA to benefit from the expertise of firms active in digital markets.
- 1.5 The DMCCA will operate alongside other national and supranational legal frameworks (EU, Germany and Japan) with many others set to come into force shortly (Australia, Brazil, India and Turkey). We understand that when considering UK-specific market conditions, there may be a need for divergence from other regimes. However, we would encourage the CMA to aim for international cooperation with key regulators to secure regulatory alignment and minimising divergence wherever possible.

¹ Baker & McKenzie LLP is the UK registered entity of Baker McKenzie, a Swiss Verein.

2. STRATEGIC MARKET STATUS

- 2.1 We believe that the test to designate a firm with Strategic Market Status ("SMS") rightly accounts for diversity in business models and the activities undertaken by digital firms. This guards against potential unintended consequences that might jeopardise pro-competitive conduct. As such, we commend the case-specific approach towards substantive SMS assessment adopted by the CMA. However, we consider that there are particular areas where the DMCC Guidance could enhance transparency for market participants and more precisely outline the limits of the CMA's discretionary authority.

Identifying a digital activity

- 2.1 While some flexibility is necessary to adapt to the rapidly evolving digital sector and hence in the definition of what constitutes a 'digital activity', the CMA should offer greater clarity as to what activities will fall within the scope of the regime. In particular:
- (a) The DMCC Guidance makes it clear that identifying digital activities is a case-specific assessment and that the CMA may vary its approach between investigations depending on the particular circumstances of a case (paragraph 2.11). We consider that the lack of a standardised approach creates uncertainty for and the perception of unfair treatment amongst market participants. We respectfully submit that the DMCC Guidance should provide clearer and more consistent guidelines as to the precise circumstances in which the CMA's approach may differ between investigations.
 - (b) It is noted that the CMA will have a broad discretion to group multiple digital activities for designation purposes, based on factors such as how the products are made, marketed, sold, accessed, or consumed, and not necessarily their technical complementarity (paragraph 2.14). So that this discretion does not become an unfettered mechanism for designating activities in respect of which businesses do not enjoy substantial and entrenched market power, further clarity on which factors will determine whether the CMA in fact exercises its discretion to group activities into a single designation would be welcome.

Link to the United Kingdom

- 2.2 The DMCC Guidance notes that a digital activity is linked to the United Kingdom ("UK") if one of three criteria applies: (i) the digital activity has a significant number of UK users; (ii) the undertaking that carries out the digital activity carries on business in the UK in relation to the digital activity; and (iii) 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. Given the breadth and undefined nature of each criterion, it seems likely that almost any extraterritorial activity would be sufficient to meet at least one. We recommend that greater certainty therefore be provided around the UK nexus requirement.
- (a) Further guidance would be helpful, in particular, around the first criteria, in respect of what constitutes a 'significant' number of UK users. While the DMCC Guidance explains that this is context specific and provides no quantitative threshold, it would nonetheless provide greater legal certainty and predictability if at least an indicative threshold was provided below which the CMA would not find the criteria to be met. In addition or alternatively, the CMA could provide illustrative examples of what constitutes a 'significant number of UK users' in different contexts.

- (b) Additionally, the third criterion, which considers whether 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, could benefit from further elaboration. Specifically, it would be useful to outline the types of effects that would be considered substantial and foreseeable. For instance, would this include economic impacts, changes in consumer behaviour, or technological advancements? Providing concrete examples in the DMCC Guidance showing how this criterion will be applied would help businesses better understand the threshold for this requirement. Moreover, clarifying the timeframe within which these effects must occur to be deemed 'immediate' would also enhance predictability.

Substantial and entrenched market power

2.3 There are significant consequences associated with a firm being designated as having SMS status, not only for the firm itself but also for third parties and development in the relevant sector. As such we would encourage the CMA to provide more clarity on how it will apply its SMS conditions, particularly on whether *"the firm has substantial and entrenched market power"*.

- (a) The DMCC Guidance (paragraphs 2.40 to 2.52) details the role of market power in the SMS conditions, specifically the CMA's approach to assessing 'substantial' and 'entrenched' market power. While stating that the mere holding of market power is insufficient for a finding of SMS (paragraph 2.40), the DMCC Guidance excludes the application of precedent relating to the assessment of dominance (paragraph 2.45) and also states that the CMA is not required to define a relevant market when assessing SMS (paragraph 2.10). Although we acknowledge that the legal test for 'substantial' and 'entrenched' market power is intentionally distinct from an assessment of dominance, we nonetheless encourage the CMA not to discount analytical tools used to evaluate the extent and effect of dominance, including market definition. This approach would not only foster a more predictable regulatory framework by providing businesses with a useful initial reference point but would also reduce the burden of assessment for the CMA. It is also unclear how the statement in paragraph 2.10, that a market definition exercise is unnecessary, is consistent with the proposed approach to assessing market power as outlined in paragraphs 2.40-2.52, which incorporate many concepts that can only accurately be evaluated if the relevant market is first defined.
- (b) In its current form, it is unclear how the CMA will assess 'entrenchment' of grouped digital activities during designation, which could have wide-ranging implications for SMS firms. We would encourage greater clarity to be provided in the DMCC Guidance in this respect.
- (c) As the DMCC Guidance does not envisage infringement of legislation at the designation stage, the evidentiary standard for assessing the SMS conditions should have a strong basis. Additionally, the CMA's approach to forward-looking analysis needs to be clearly articulated, considering the lack of quantitative requirements. We believe that it would benefit both potential SMS firms as well as interested third parties if the DMCC Guidance could provide further detail on the quantitative and qualitative evidence, as well as indicative features, that the CMA may consider in its assessment of both substantial and entrenched market power and position of strategic significance. This would retain the CMA's discretion to adapt its approach on a case-by-case basis as necessary while providing clarity to market participants.

SMS investigation procedure

- 2.4 While the DMCC Guidance provides a comprehensive framework for the CMA's SMS investigation procedure, we consider that certain improvements could be made to enhance clarity and effectiveness:
- (a) Under the DMCC Guidance, the CMA's ability to begin an investigation "at any time" (paragraph 2.76), and to open a new SMS investigation having closed an earlier one (paragraph 2.93), grants it significant flexibility. However, the circumstances in which this might be appropriate should be delineated more clearly. More broadly, the designation process, including the steps and criteria for challenging a designation, should be articulated more robustly within the DMCC Guidance.
- 2.5 The DMCC Guidance outlines the process for consulting with SMS firms and third parties on its proposed decision (paragraph 2.83). While this is a positive step, we strongly encourage the CMA to engage with SMS firms and third parties at an earlier stage in the investigation process. In doing so, the CMA will be able to enhance the robustness of its investigations and decision-making processes.

3. CONDUCT REQUIREMENTS

- 3.1 We appreciate the CMA trying to build an enforceable code of conduct for SMS designated firms to manage the effects of market power. However, given the DMCCA gives the CMA wide-ranging powers to impose Conduct Requirements ("CR") on SMS firms, it is necessary to balance the way these new regulatory requirements are applied with the nature of the procedural safeguards for those affected, as these are interdependent questions.
- 3.2 Additionally, we would encourage the CMA to explicitly note that the listed statutory objectives of "fair dealing", "open choices" and "trust and transparency" be principles that are not only applicable to SMS firms but to all digital market participants. We believe that there are specific aspects of the CRs where the DMCC Guidance could provide more clarity for potential SMS firms in order to ensure effective guardrails to prevent against regulatory capture.

Imposing Conduct Requirements

- 3.3 CRs have the potential to alter how SMS firms operate not only with respect to the relevant digital activity but also more broadly in the relevant market. While some flexibility is necessary in order to develop CRs that are proportionate and outcome oriented, we would encourage the CMA to detail how it will decide to impose CRs without attempting to control broader business decisions of SMS designated firms as doing so would undermine competitive vitality and innovation in these firms. In particular:
- (a) The DMCC Guidance does not establish a clear test that the CMA will apply to determine when to impose CRs (for example, akin to a finding of a 'substantial lessening of competition' (SLC) under the EA 2002 in relation to mergers). This gives rise to unpredictability for SMS firms trying to modify their conduct to remain compliant with the UK competition regime and no opportunity for jurisprudence or decisional practice to develop in this area owing to the limited opportunity for judicial review under the digital markets regime.
- (b) There should be a clear explanation as to the circumstances where CRs will be applied to non-designated activities. The DMCC Guidance suggests CRs may be applied to non-designated activities based on an assessment that conduct is "*likely to increase [the SMS firm's] substantial and entrenched market power and/or strengthen its position of strategic significance*" (paragraphs 3.13-3.15). This approach appears to undermine the activity-specific SMS

designation approach and impinge on the firm's business freedoms, particularly as the CMA will have gained no or only limited evidence about the non-designated activity in any SMS investigation and parties will presumably not have had the opportunity to test the basis for the CMA's approach. As such, we would welcome more clarity from the CMA on how a proportionate framework will be established for this assessment.

Procedure for imposing Conduct Requirements

- 3.4 The DMCC Guidance does not appear sufficiently clear on the processes around designing and implementing CRs and the CMA's powers in relation to this process. We appreciate that the CMA will identify as its starting point the aim of the CR. However more details need to be provided:
- (a) In terms of timing, it would be appreciated if the CMA could put in place an administrative timetable for imposing CRs, or at the very least an indication on timing around milestones in the CR process, similar to the administrative timetable under the CMA's merger control regime. The DMCC Guidance indicates that the CMA may at "any time" during designation period impose a CR (paragraph 3.34). This provides no certainty to businesses.
 - (b) We note that the DMCC Guidance includes consultation (paragraph 3.41 to 3.47) as an important element of its CR process. In addition to its proposal to engage with stakeholders, the digital markets regime would greatly benefit from active engagement with SMS firms at an early stage to determine the suitability, feasibility and benefits of any CRs. For example, the change brought about by the CMA in its new Phase 2 (2024 Guidance) where parties have a greater opportunity to have earlier and more frequent engagement with the Inquiry Group benefits the remedies process and the substantial assessment of the case.

4. PRO-COMPETITION INTERVENTIONS

- 4.1 The DMCCA affords the CMA broad powers to impose pro-competition interventions ("PCIs") on firms designated as having SMS. However, the DMCCA does not establish a clear test that the CMA will apply when determining whether to impose PCIs and we would, therefore, welcome clarity on the circumstances in which the CMA will do so. We consider that greater legal certainty for SMS firms and advisors could be achieved in respect of the following:

Assessing whether there is an adverse effect on competition

- 4.2 In determining whether to make a PCI, the DMCC Guidance explains that the CMA must consider whether "a factor or combination of factors relating to a digital activity" is having an adverse effect on competition ("AEC") (paragraph 4.4). The DMCC Guidance is clear that the CMA will have the flexibility to investigate a wide range of possible factors (paragraph 4.5), and that the factors giving rise to an AEC, or the AEC itself, may relate to or occur within any digital activity that is "connected" to the designated digital activity (paragraph 4.17). The DMCC Guidance does not seem to adequately define what degree of connection is required for these purposes beyond very limited and non-exhaustive examples. It is important that PCIs be aimed at addressing the root causes of substantial and entrenched market power in digital markets and should not be imposed outside firms' designated SMS activities. Further clarity in this regard would therefore be welcome. The DMCC Guidance makes it clear that, in assessing whether there is an AEC, the CMA does not have a prescriptive list of evidence that it will take into account and, indeed, that there is no set hierarchy between quantitative and qualitative evidence (paragraph 4.19). We consider that the AEC should be established on the basis of a proper evidence-based economic assessment, as opposed to presumptions about what is harmful in a digital context. As

such, we suggest that, whilst the CMA may give consideration to any qualitative data, quantitative evidence (primarily in the form of economic assessment) take precedence.

Identifying an appropriate pro-competition intervention

- 4.3 In designing an appropriate PCI, the DMCC Guidance explains that the CMA maintains broad discretion on the type of remedy which it chooses to impose; that, through pro-competition orders ("PCOs"), it can impose both structural and behavioural remedies (paragraph 4.25) and, may rely on a mix of the two measures (paragraph 4.30). We welcome the inclusion of a proportionality assessment in determining the effectiveness of a proposed PCI (paragraph 4.34) and the express inclusion in the DMCC Guidance of the importance of engagement between SMS and the CMA on potential PCI options as early as possible in the process (paragraph 4.36). Nonetheless, we consider that the DMCC Guidance could provide further clarity on the circumstances in which certain remedies would be considered appropriate and, in particular, what factors may be more likely to lead to remedies imposing higher cost burdens and irreversible change for SMS firms (i.e., divestiture).

Pro-competition intervention procedure

- 4.4 Given the very short nine-month timetable for conducting PCIs, we would encourage the CMA to ensure that it meaningfully engages with the SMS firm as well as interested third parties throughout the process. Further clarity on the procedural steps for applying PCIs would be very helpful for SMS firms and advisors alike – for instance, with respect to the type of engagement on the terms of the PCO that is envisaged with the SMS firm in advance of the public consultation (paragraph 4.56).

5. INVESTIGATORY POWERS

Various investigatory powers

- 5.1 While parameters are necessary to ensure that the CMA's investigatory powers have the desired impact, the following changes would benefit both the CMA and companies in the digital sector:
- (a) In paragraph 5.18, we would suggest that there should be scope to extend the deadline such as is provided for in paragraph 6.10 of "*Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA*".
 - (b) We believe that it would be onerous to impose a penalty on a senior manager "*to prevent certain failures or actions of the firm*" (paragraph 5.28). We believe this may deter individuals from agreeing to be nominated as a senior manager. In relation to imposing penalties on senior managers, in our view, penalties should only be imposed where a breach is intentional or deliberate, for example, for acts done with the clear intention of obstructing an investigation, or an intention to provide false or misleading information or destroy evidence.
 - (c) Depending on the circumstances, we consider that the obligation on companies to provide access to information and services stored or provided outside the UK could be too onerous (e.g. where such information or services are not normally accessible from the UK, or in jurisdictions such as Switzerland where the Swiss Blocking Statute may apply) (see paragraphs 5.35, 5.50, 5.62, 5.72). In relation to paragraph 5.41, we note that if advisers to the firm are not able to attend an interview with the employee, then the firm cannot be held responsible for any inaccuracies (or for identifying and correcting any inaccuracies) in the account given by the employee.

Power to enter premises without a warrant

- 5.2 In terms of the power to enter premises without a warrant, we recommend that greater certainty be provided as follows:
- (a) We note the statement in paragraph 5.57 that "*CMA officers are authorised to enter premises using such force as is reasonably necessary*". The "*Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*" states in respect of such force "*but only if they are prevented from entering the premises. CMA officers cannot use force against any person*". We would suggest including this wording in paragraph 5.57.
 - (b) We note that in paragraph 5.58, "*The warrant may also authorise people who are not employees of the CMA to accompany and assist CMA officers*". We would suggest that provisions are included to ensure that such individuals are bound by the same duty of confidentiality as the CMA officers they are assisting. Paragraph 5.59(f) states, "*The warrant also authorises CMA officers to...require the production of any information which is accessible from the premises, including material stored remotely or online in electronic form*". In respect of this, we would suggest clarifying that, the information is to be "*information appearing to be information of the relevant kind.*"

Reports by skilled persons

- 5.3 In terms of the CMA requiring a skilled person to report to it on a matter relevant to the operation of the time:
- (a) We believe that identifying a shortlist of three alternative providers could be quite time consuming for a company, depending on what the report relates to (paragraph 5.70, (a) – (c)). We would suggest that the firm is able to engage with the CMA in advance of preparing the shortlist so the CMA can confirm how many alternative providers are necessary.
 - (b) With regards to paragraph 5.71, should the CMA decide to appoint a skilled person to produce a report, we would suggest that the CMA informs the firm in advance of the costs that the firm will be required to pay to the skilled person. This ensures the firm has oversight in advance of the cost of preparing the report and any expenses (which we understand the firm may also be required to pay (per section 79(4) of the DMCCA)).
 - (c) Additionally, we believe that footnote 306 in paragraph 5.72 may need to be updated to Section 118(3) of the DMCCA.

Duty to preserve information

- 5.4 In the circumstances where a person has a legal duty to preserve relevant evidence, it may be difficult for a firm to comply with certain provisions, namely:
- (a) In terms of overseas investigations, paragraph 5.75 (d) states "*any of its functions which correspond or are similar to the digital markets functions of the CMA*". This could be difficult as a firm may not be familiar with the digital markets functions of overseas regulators. Furthermore, it would be difficult for the firm to "*know[s] or suspect[s] that the CMA is assisting or is likely to assist an overseas regulator*" if the firm is not familiar with the functions of overseas regulators. It would also be helpful if the CMA could include further guidance in

paragraph 5.78 indicating how the CMA will typically consider a person to know that the circumstance in 5.75(d) is applicable.

- (b) Furthermore, in paragraph 5.77 (c), it may be difficult for firms to know or suspect information is or would be "*relevant to the provision of assistance to the overseas regulator*".
- (c) More guidance would be welcome in respect of how the CMA will decide that a firm should have suspected that an investigation "*is being or is likely to be carried out*" by the CMA (paragraph 5.79), given this could lead to a very broad duty to preserve information.

Protection of confidential information

- 5.5 In respect of confidentiality and whether the CMA will provide details of the information to be disclosed, we note that statement that, "*The CMA might choose not to do so if, for example, it considers that the party has already had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to protect the information to be disclosed (for example, by anonymising or aggregating data).*" We would request that the parties have a chance to make representations in respect of potentially confidential information.

6. MONITORING

- 6.1 We note that the CMA has broad monitoring functions to facilitate effective regulation of digital markets. However, it is very important that this monitoring function is not unfettered, creating a potentially disproportionate burden on regulated parties beyond the intended scope, impact and objectives of the digital markets regime. To help ensure there is an appropriate level of proportionality in the CMA's monitoring function, we would welcome specific guidance on the factors the CMA will take into consideration before it commences such monitoring activities – by way of example, factors such as those the CMA will use to consider the proportionality of CRs as described in paragraph 3.30 of the DMCC Guidance.
- 6.2 In light of this, and to help ensure greater certainty and clarity on the CMA's monitoring functions, we would welcome additional guidance on the following specific aspects of the regime:
 - (a) Compliance reporting – The DMCC Guidance should provide additional clarity on the nature of compliance reporting, including with respect to the expected frequency and content of such reports. It will also be important to align the reporting requirements for SMS firms designated for multiple activities, so as to limit the burden placed on such firms.
 - (b) Participative resolution – Additional clarification on the CMA's approach to participative resolution on compliance concerns would be helpful. In particular, clarification on the process, form and relevant timelines for engagement with SMS firms will facilitate transparency.
 - (c) Complaints – Clarification is required on the complaints procedure, specifically how complaints will be reported and the scope of information that will be provided to SMS firms.
 - (d) Nominated Officers – It will be important to receive guidance on the role and expectations of Nominated Officers, including the form and frequency of compliance reporting.

7. ENFORCEMENT OF COMPETITION REQUIREMENTS

7.1 We appreciate the CMA will investigate and take enforcement action where it suspects that there has been a breach of a requirement imposed under the digital markets competition regime. In terms of the procedure for launching an investigation and any provision findings:

- (a) In respect of the CMA's ability to determine the period in which firms may make representations in relation to the conduct investigation, we note the statement that *"This period will be at the CMA's determination (section 26(5) of the DMCCA). As such, the CMA may provide for an indicative period, and the period may be subject to further notice on the applicable period being provided by the CMA"*. We would request that the CMA include a typical indication of time period.
- (b) In terms of provisional findings (paragraph 7.23), we believe that parties should be able to make confidential representations on the CMA's provisional findings before they are published. Additionally, parties should be given advance notice of any provisional findings that will be published.
- (c) In respect of the CMA's statement that *"the acceptance of a commitment does not prevent the CMA beginning a new conduct investigation in relation to the behaviour to which the commitment relates"* (paragraph 7.89), we would request that the firm should have the opportunity to assess the commitment's relevance and usefulness to the newly launched investigation and have the option to withdraw the commitment.
- (d) Where the CMA *"will consider the need to protect any confidential information"* (paragraph 7.138) relating to bids, we would request a formal confidentiality representation process for the relevant firm.

Enforcement orders

7.2 Relating to Interim Enforcement Orders ("**IEOs**"):

- (a) Where the CMA does not give a firm the opportunity to make representations about an IEO it proposes to impose, we believe it would be helpful to provide examples and circumstances when the CMA would *"consider[s] that doing so would substantially reduce the effectiveness of the order"* (paragraph 7.45).
- (b) We suggest that the time period for which firms can make representations about an IEO should include a reasonableness qualification, to prevent the deadline from being overly onerous (paragraph 7.46).
- (c) We consider that the CMA should review the relevant firm's representations prior to publishing the IEO on its website where the IEO is made effective by the CMA without giving the firm an opportunity to make representations (paragraph 7.50).

7.3 Relating to Enforcement Orders ("**Enforcement Orders**"):

- (a) Where the CMA *"may consult such persons as it considers appropriate before making an EO"*, we believe it would be helpful to provide examples and circumstances where the CMA would do so (paragraph 7.96).

- (b) In respect of the CMA's statement that "*as soon as reasonably practicable after making an EO the CMA must publish the order on its website*", we would request that any comments received from the firm regarding the EO (see paragraph 7.96) are considered prior to the CMA publishing the EO on its website (paragraph 7.99).

8. PENALTIES FOR FAILURE TO COMPLY WITH COMPETITION REQUIREMENTS

- 8.1 We have a number of observations on the CMA's proposed approach to penalties, as set out below.

Whether to impose a penalty and the type of penalty imposed

- 8.2 We consider that there should be a new section above paragraph 8.11 of the DMCC Guidance providing guidance on what the CMA considers a 'failure to comply' with a competition requirement to be. Setting out in some detail what the CMA believes to be a failure to comply would be a preferable approach when it comes to the giving of guidance rather than leaving firms to guess what the CMA means by a failure to comply.
- 8.3 Paragraph 8.11 of the DMCC Guidance sets out the factors that the CMA will consider when deciding to impose a penalty. We broadly agree with the factors but would welcome more clarity on how the CMA will assess whether a failure to comply is "*serious in nature and/or significant in impact.*" What would constitute a serious failure to comply and how will the CMA measure the significance in impact? We think that it would also be helpful for the CMA to explain what the broad levels of the penalty might be and how each of the factors in paragraph 8.11 might affect the broad level into which the failure to comply with a competition requirement falls.
- 8.4 In our view, and as suggested in paragraph 8.11 (c) of the DMCC Guidance, penalties should only be imposed where a failure to comply is intentional or deliberate. Given the increasing time pressures and resource burdens placed on companies during CMA investigations, imposing penalties where breaches fall below this level of intent would be disproportionate.
- 8.5 We consider that paragraph 8.11 (f) is vague and would welcome an explanation of how the CMA will assess whether a firm would have been expected to obtain an advantage or benefit from the failure to comply.
- 8.6 With respect to paragraph 8.14, we disagree that it will often still be appropriate to impose a penalty where a failure has been remedied. In our view, imposition of penalties where a failure has already been rectified should be the exception. If a firm has recognised its failure and taken steps to address the problem, it would be unfair to impose a penalty nonetheless. Where the CMA does impose a penalty in such circumstances, we consider that the fact that the failure has been remedied should be a mitigating factor and the level of penalty adjusted accordingly at Step 3.
- 8.7 Regarding the notion of "*reasonable excuse*" as set out in paragraph 8.16, we agree it is appropriate to apply an objective test. It would be helpful to include in the DMCC Guidance practical examples of events or factors that the CMA would potentially consider to be a reasonable excuse. We disagree with the approach in paragraph 8.18 which is that the CMA is unlikely to accept as a reasonable excuse any claim that non-compliance is required under an agreement or contract. We do not consider it is appropriate for the CMA to expect a firm to breach a legally binding agreement that it may have entered into in order to comply with a competition requirement.

Steps for determining the level of penalty

- 8.8 We have detailed below our observations on the CMA's proposed method for determining the level of penalty.
- (a) Step 1 – assessment of seriousness. We note that the CMA intends to apply a percentage starting point of up to 30% to a firm's relevant turnover in order to reflect the seriousness of the failure to comply. We consider it would be helpful for the CMA to indicate the range of percentage starting point that it will generally expect to apply, which we would expect to be well below 30%, given that the CMA will have the ability to apply an uplift at Step 2 and make adjustments at Step 4. We recommend a lower starting point (e.g., 10% – 20%), which would likely be sufficiently high to produce a fine that is at such a level as to clearly discourage firms from failing to comply with competition requirements.
 - (b) Step 3 – adjustment for aggravating and/or mitigating factors. We note that Footnote 554 states that the CMA will take into account engagement and discussions on compliance with the firm that occurred before enforcement action when determining whether a reduction for a mitigating factor is appropriate. This is an important and positive point and we consider that it should be moved into the main body of the guidance rather than relegated to a footnote. We encourage the CMA to go a step further and include any compliance measures taken by the firm that occurred before enforcement action as one of the mitigating factors in Step 3. This is more likely to incentivise firms to comply effectively with their competition requirements. The consideration of genuine compliance efforts as a mitigating factor in setting a penalty creates a strong incentive for senior management in companies to take compliance seriously and to invest the time and money into creating appropriate measures.

9. ADMINISTRATION

- 9.1 We have some comments on the sections on Transparency and the Duty of Expedition in the DMCC Guidance.

Transparency

- (a) Paragraph 9.21 of the DMCC Guidance states that the CMA will aim to provide to the firm under investigation information on who the decision-maker will be for relevant decisions, "where appropriate". We consider that the CMA should be under an obligation to inform firms who will be making the key decisions in relation to the relevant case. This is important in order to enable proper accountability and rights of redress for parties, as well as administrative efficiency.

Duty of expedition

- (b) Paragraph 9.24 of the DMCC Guidance sets out the CMA's approach to requests for information and we welcome the commitment by the CMA to be fair and reasonable. We consider that the CMA should also in this paragraph commit to discussing drafts of information requests with parties in advance to issuing them. This would assist with the duty of expedition and improve efficiency. It would also be consistent with the approach set out earlier in the DMCC Guidance in paragraph 5.17.

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

10.1 As SMS firms will be subject to a mandatory reporting requirement and failure to comply will result in the imposition of fines, it is important for the reporting thresholds and parameters for review to be clear, predictable and consistent in their application. In this regard, we would encourage the CMA to develop the guidance on the reporting requirements for SMS firms ("**Reporting Guidance**"), specifically to provide clarity on reporting thresholds and how the CMA will consider these parameters. We would also encourage the CMA to publish its decisions in this regard, to help facilitate a consistent and predictable approach.

Process

10.2 We note that the Reporting Guidance provides for a five working day waiting period following an SMS firm's submission of the notice under the DMCCA before the CMA will confirm that the submission is sufficient (the "**Review Period**"), followed by a further five day period, during which a reportable event cannot take place (the "**Waiting Period**"). Should the CMA reject a notification as insufficient, the initial Review Period will start afresh.

10.3 We would encourage the CMA to build flexibility into the process to allow parties to submit notifications earlier in the deal timeline when there is a good faith intention to enter in to the transaction (i.e., when the transaction is no longer simply hypothetical but before signing has occurred). This approach will allow the parties the ability to trigger the Review Period earlier and would be consistent with other mandatory and suspensory regimes.

10.4 We would also expect efficient reviews, which are not left open-ended, and encourage the CMA to develop and publish guidance, ideally including guidance on internal deadlines the CMA will adhere to following the Waiting Period, for the CMA to either investigate the transaction or confirm there are no further questions or clarifications required. This will facilitate certainty, predictability and efficiency in the review, as well as transactional expediency.

11. CONCLUSION

11.1 Baker McKenzie thanks the CMA for the opportunity to comment in this Consultation. We are happy to engage with the CMA further on any of the points discussed above. Should that be helpful, please feel free to contact [REDACTED].

Baker McKenzie

July 2024