British Institute of International and Comparative Law

Charles Clore House 17 Russell Square London WC1B 5JP

T02078625151
F02078625152
E info@biicl.org

www.biicl.org

Consultation on the CMA digital markets competition regime guidance

BIICL welcomes the opportunity to provide comments and suggestions to the CMA's guidance to the Digital Markets, Competition and Consumers Act 2024 (DMCC). While the consultation relates to both the digital markets competition regime guidance and the guidance on the merger reporting requirement for firms with strategic market status (SMS), this submission focuses on the former rather than the latter.

This submission highlights some general issues followed by some more specific issues.

General issues

On 24 May, the DMCC got Royal Assent. On the same day, the CMA published its draft guidance CMA194con DRAFT. The guidance is extremely long. It is almost as long as the part of the Act it relates to and mainly reiterates the Act. It appears to be explanatory notes rather than guidelines. Perhaps the CMA should consider renaming the document.

Helpfully however, the CMA has issued draft summery guidance, which is significantly shorter and easier to digest. In the final version of this summery guidance, it would be helpful if it contained hyperlinks to the relevant parts of the longer guidance/explanatory note.

Given the DMCC Act deals with other aspects than digital markets, for example enforcement of consumer protection law, it would be beneficial to also see guidance on these other aspects of the DMCC.

The newly elected Labour Government has made economic growth its mission. It would be useful if the CMA could articulate how its new regime will deliver and align with this mission.

Specific issues

- In line with chapter 2 section 2 of the Act, paragraph 2.42 of the guidance says the mere holding of market power is not in itself sufficient for an undertaking to meet the first SMS condition, which requires that market power is 'substantial' **and** 'entrenched'. Each element needs to be demonstrated as they are distinct. Yet paragraph 2.52 seems to indicate that where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, entrenchment can be presumed. Is this in line with the statutory interpretation?

- Similarly, chapter 2 section 5 of the Act says assessing whether a firm has substantial and entrenched market power is a forward-looking assessment, but paragraph 2.51 says that the CMA can rely on past market power and previous market developments to establish whether market power is substantial and entrenched. Again, is this the correct statutory interpretation?

- Chapter 3 of the guidance deals with imposing, revocation, variation and reviewing of CRs. Will the CMA allow a SMS firm any input in these processes in form of making representation or engaging in a dialog? If so, how would it work?

- When imposing a CR, will the CMA look at counterfactuals?

- When designing and imposing CRs on a SMS firm, I assume the CMA will avoid duplication by considering whether the same issue has already been considered under the Competition Act 1998. If a commitment has already been provided by an undertaking under the Competition Act 1998, I assume the CMA will not re-review these under the DMCC. If this is correctly understood, it would be good to articulate this in the guidance. Apart from the impact on resources, re-considering a case that has already been looked at under the Competition Act 1998 may contravene the principles of *ne bis in idem* and proportionality.

- Chapter 3 paragraph 3.74 of the guidance allows the CMA to investigate and enforce against historic breaches of CRs. Does the limitation period of 6 years set out in the Limitation Act of 1980 apply?

- The DMCC Act imposes a duty on the CMA to consult on a great number of mechanisms for example, (i) any proposed decision to designate a firm, (ii) any proposed decision to impose a CR or additional CRs, varying or revoking existing CRs, (iii) any proposed decision to propose a PCI investigation and subsequent decision, (iv) any proposed decision to propose or modify a commitment. This participatory – and time consuming – approach gives third parties and other stakeholders an opportunity to respond to consultations. Does SMS firms have an equal right to make representation?

- Furthermore, it would be helpful to understand how the CMA sees the participatory approach working in practice. It would be great if the CMA could provide some examples in the final guidance. It would also be good to understand how the participatory approach differs from the current arrangements.

- Chapter 4 paragraph 4.65 of the guidance allows the CMA to impose a test requirement. It would be helpful to know the process for how that will work. For example, if the proposed remedy is being tested and considered not to work, what happens if the SMS firm can't reverse engineer the remedy? Paragraph 4.67(b) seems to suggest that only reversable remedies are being tested, but does the CMA have the technical expertise to assess this prior to testing?

- Chapter 4 paragraph 4.91 of the guidance allows the SMS firm to propose commitments, but the timing of when to do that is opaque. It would be helpful with some guidance on timing.

- Chapter 5 of the guidance entails provisions for a skilled person. The concept of a skilled person is a well-known from financial services (FSMA section 166). In the year 2022-2023, the FCA used the section 166 power in 44 cases. However, this has not always worked well in practice, as highlighted by John Swift in his independent review of Interest Rate Hedging Products. Hopefully, the CMA will learn from the FCA to avoid some of the same pitfalls in particular in relation to accountability. Currently, the guidance focuses on the report, appointment and remuneration of the skilled person, but it is the responsibility and accountability between the skilled person, the SMS firm and CMA that is important. It would be in everyone's interest if the CMA addresses these points in its final guidance.

- Chapter 5 paragraphs 5.44 and 5.51 of the guidance allow the CMA to enter premises with and without a warrant. Could the CMA provide some guidance as to when you will use a warrant and when you are unlikely to use one.

- Chapter 7 paragraph 7.28(b) of the guidance relates to disclosure. I am not sure the guidance is fully compliant with right to access information under the ECHR. The Guidance notes where the volume of information is considerable, it will provide the firms under investigation with the "gist" of the relevant information and/or copies of the documents directly referred to in the provisional breach finding; and a list of other documents the CMA considers relevant, with the firm being able to make reasoned requests for access to specific listed documents. To be ECHR compliant and ensure rights of defence are fairly protected, the guidance should provide undertakings under

investigation with effective access to key materials and evidence, rather than the gist or documents the CMA considers relevant.

- Chapter 9 paragraphs 9.28 and 9.29 of the guidance outline what decisions are reserved for the Board and which ones are reserved for the Board Committee. However, it would be helpful to understand in more detail how people are selected to the Board Committee and for how long. Equally, it would be good to know how the CMA ensures independence of appointed members and their involvement in non-CMA work and finally stakeholders' access to the Board Committee.

BIICL looks forward to continue engaging with the CMA on how to establish and further enhance the guidance over the coming months.

Best regards,

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British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP
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