

Competition and Markets Authority Consultation on Digital Markets Competition Regime Guidance

Response of Cleary Gottlieb Steen & Hamilton LLP

Introduction

1. Cleary Gottlieb Steen & Hamilton LLP welcomes the opportunity to comment on the Draft Digital Markets Competition Regime Guidance (the **Draft Guidance**).¹
2. The Digital Markets, Competition, and Consumers Act (**DMCC Act**) grants the CMA significant new powers to draft, apply, and enforce rules for firms designated as having strategic market status (**SMS**) in respect of one or more digital activities. These rules do not need to be ratified by Parliament, and appeals of most of the CMA's substantive decisions are not heard "on the merits" but are instead based on judicial review standards.
3. The new regime must therefore be underpinned by clear and practical guidance on the CMA's procedures and enforcement, effective checks and balances on discretionary power, and fair decision-making processes with strong procedural safeguards.
4. We are encouraged by the CMA's desire for a flexible, collaborative approach to implementing the new regime² and we appreciate the CMA's setting out how this will be applied in practice through the Draft Guidance. The Draft Guidance is detailed and comprehensive and—for the most part—provides a clear steer both to firms subject to the new regime and firms and users that benefit from it. There are, however, areas where the Draft Guidance can be further improved and clarified.
5. We group our observations into five themes:
 - First, the CMA's broad discretion to impose conduct requirements (**CRs**) on SMS firms (**Section I**).
 - Second, the role of consumer benefits (**Section II**).
 - Third, the principles and processes that apply to SMS designation (**Section III**).

¹ These comments are made on our own behalf. They are based on our experience representing clients in proceedings before the CMA and other competition authorities. They do not necessarily represent the views of our clients.

² See, e.g., Sarah Cardell, [remarks during the Concurrences Tech Antitrust Conference, Palo Alto, USA](#) (January 11, 2024).

- Fourth, the CMA’s ability to impose compliance reporting mechanisms and its information-gathering powers (**Section IV**).
 - Fifth, the CMA’s decision-making processes (**Section V**).
6. Under each theme, we set out suggested amendments to the Draft Guidance for the CMA’s consideration.

I. The CMA Should Provide More Detailed Guidance on its Approach to CRs

7. The principle of proportionality underpins the DMCC Act. For example, the CMA may impose CRs on SMS firms only if it is proportionate to do so, and any pro-competition interventions (**PCIs**) must be proportionate to remedy, mitigate, or prevent an adverse effect on competition.
8. Given the wide latitude the DMCC Act affords the CMA in setting rules, applying them, and imposing penalties, the final guidance (**Guidance**) should set out proportionate guardrails on how the CMA will apply the regime in practice. We make five observations in this connection.
9. **The relationship between CRs and PCIs should be clarified.** The Draft Guidance currently provides little direction on the circumstances in which the CMA would choose to impose a CR or make a PCI to address competition issues.
10. Additional guidance on this issue is important given the different purposes CRs and PCIs serve, and the different legal tests applicable to them. PCIs are intended to “drive longer-term dynamic changes in [SMS firms’ designated] activities, opening up opportunities for greater competition and innovation.”³ By contrast, CRs seek to prevent the *exploitation* of existing market power, rather than its source.⁴ The CMA has also indicated that PCIs exist to address competition issues that do not involve changing a firm’s existing behaviour (in which case CRs would be a better instrument).⁵
11. PCIs involve direct intervention that has the potential to be more far-reaching, burdensome, and costly. Similar to the CMA’s existing market investigation tool, PCIs can result in behavioural, informational, and even structural remedies. The DMCC Act therefore requires the CMA to establish an “adverse effect on competition” (**AEC**) before it can impose a PCI. In these circumstances, it is important that the CMA does not “short circuit” the AEC precondition and impose

³ CMA, [A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce](#), CMA135 (December 2020), ¶13.

⁴ UK Government, [Government response to the consultation on a new pro-competition regime for digital markets](#) (May 2022) (hereinafter *Government Consultation Response*), ¶50 (“Conduct requirements will manage the effects of market power by setting out how firms are expected to behave in respect of the activities in which they are designated with Strategic Market Status.”).

⁵ CMA, [Online platforms and digital advertising market study: final report](#) (July 1, 2020), ¶7.103.

requirements better suited to PCIs via CRs. This would undermine the role of PCIs in the new regime whereby the CMA can impose more intrusive remedies, but only when it can establish an AEC.

12. The DMCC Act itself creates uncertainty over whether a given issue should be addressed more appropriately via CRs or PCIs.⁶ This was reflected in our comments to the House of Lords and Public Bill Committee as the DMCC Act passed through Parliament.⁷ The Draft Guidance similarly does not address the circumstances in which CRs will be used instead of PCIs or *vice versa*, including in relation to similar themes (*e.g.*, interoperability).
13. Presently, there is no limiting principle or rule that prevents the CMA from shortcutting the PCI process and imposing rules via CRs that have the same effect as PCIs, without establishing an AEC. The Draft Guidance instead includes a broad statement that the CMA will select what it considers to be the most appropriate tool having regard to the relevant circumstances.⁸
14. To address these concerns, the Guidance should include defined criteria and/or principles for assessing when PCIs or CRs are more appropriate. This clarification would assist SMS firms to understand and prepare for regulatory requirements and ensure a more consistent and transparent application of the regime for the benefit of all stakeholders. In particular, we suggest the following four improvements:
 - First, the Guidance should clarify that the CMA would not impose CRs that would have the same impact on the SMS firm as a remedy imposed following a PCI and *vice versa*.
 - Second, the Guidance should reflect that where the CMA is contemplating opening a PCI investigation in respect of a similar or related practice that is already covered by a CR, the CMA should first assess the impact of the CR in the market before it considers more intrusive measures under a PCI.
 - Third, the Guidance should make it clear that the use of CRs will be limited to preventing SMS firms from engaging in a form of conduct understood to be harmful (*e.g.*, based on past cases or empirical evidence), but leave the implementation of the CR up to the firm. By contrast, if the CMA wishes to

⁶ For example, both the Government and CMA identified mandating interoperability as a potential PCI. But the DMCC Act enables the DMU to implement CRs that prevent a SMS firm from “*restricting interoperability between the relevant services or digital content and products offered by other undertakings*” (DMCC Act, s. 20(3)(e)). It is not clear whether this conduct category could be used by the DMU to require an SMS firm to offer interoperability for the first time or whether it only applies to restrictions on interoperability that are already in place. The Government’s intention appears to have been the latter.

⁷ See Cleary Gottlieb Steen & Hamilton LLP, [Submission to Call for Written Evidence by the Public Bill Committee on the Digital Markets, Competition, and Consumers Bill](#) (June 19, 2023).

⁸ Draft Guidance, ¶3.12 and fn. 106.

impose a positive obligation on a firm to take specific action to address the “root cause” of market power (e.g., to build new infrastructure or enable access to its products or services), it should do so through PCIs.

- Fourth, the CMA should consult on its decision to open a PCI investigation (not just any decision it is considering making *as a result* of a PCI investigation).

Suggested Amendment:

The Guidance should provide additional clarity on the circumstances in which CRs or PCIs will be adopted. More specifically, the Guidance should clarify that (i) the CMA will not impose CRs that would have the same impact as a PCI remedy and vice versa; (ii) the CMA will assess the effectiveness of existing CRs before opening a PCI investigation in respect of a similar or related practice; (iii) the use of CRs will be limited to preventing SMS firms from engaging in harmful conduct, but positive obligations to address the root cause of market power will be addressed through PCIs; and (iv) the CMA will usually consult on the decision to open a PCI investigation.

15. **Equivalent CRs should be applied consistently across SMS firms.** Under the DMCC Act, the CMA will be able to tailor CRs to each SMS firm and their respective digital activities, leaving the CMA with discretion to decide the substance of CRs. This creates scope for CRs to be applied asymmetrically across SMS firms, which could lead to market distortions or unfair outcomes.
16. While the Draft Guidance clarifies many aspects of the design and implementation of CRs, it is important that the Guidance makes clear that equivalent or substantially similar CRs should be applied consistently and based on the same underlying principles when they relate to similar digital activities. For example, any requirements relating to interoperability of operating systems, self-preferencing on marketplaces, or data sharing between services should be designed, implemented, and enforced in an equivalent way across SMS firms that offer those products.

Suggested Amendment:

The Guidance should make it clear that equivalent or substantially similar CRs will be applied consistently across SMS firms.

17. **Clarify the difference between outcome-focused and action-focused CRs.** The Draft Guidance introduces two categories of CRs that are not defined in the DMCC Act: “action-focused” CRs (where the CR includes the actions the firm must take to achieve an outcome) and “outcome-focused” CRs (where the CR will specify the

outcome the SMS firm must achieve).⁹ The Draft Guidance then lists four principles the CMA will apply in determining the appropriate form of a CR.¹⁰

18. The Draft Guidance should go further in explaining the difference between action-focused and outcome-focused CRs. Specifically, two clarifications should be made:

- First, the Guidance should make clear that the CMA will not impose CRs that are dependent on, or impacted by, the behaviour of third parties. In particular, outcome-focused CRs should not involve directing the firm to act in a way that achieves a certain market outcome (such as a change in market structure or share, or consumers making certain choices when they use a designated activity). For example, a requirement to make a dataset owned by the SMS firm available on FRAND terms should not require anyone to make use of the dataset before the measure is considered effective. The “outcome” addressed by an outcome-focused CR should instead address the SMS firm’s *implementation* of a CR.
- Second, ¶3.25 should make clear that outcome-focused CRs are higher-level requirements that specify the general form a compliance measure should take (*e.g.*, presenting a particular choice to users in a neutral manner). Action-focused CRs, by contrast, can involve more detailed steps a SMS firm must take (*e.g.*, particular design elements of the choice). The Draft Guidance seems to anticipate this distinction at ¶3.25 (“[CRs] may be set as higher-level requirements, with which SMS firms may be able to comply in a number of ways, or contain more detailed and directive requirements”), but it could be made clearer that this principle distinguishes outcome-focused and action-focused CRs.

19. In addition, the Guidance could go further in explaining how the CMA will measure the outcome of outcome-focused CRs. The Draft Guidance states that the CMA is more likely to impose an outcome-focused CR when it is intended to achieve an outcome that is measurable, and compliance with that outcome will be relatively easy for the CMA and third parties to assess.¹¹ However, the absence of a clear methodology for measuring these CRs will make it challenging for the CMA to accurately assess their effectiveness, and for SMS firms to assess their compliance with them. The lack of specified methodology, benchmarks, or metrics that the CMA intends to use may lead to ineffective and inconsistent decision making.

⁹ Draft Guidance, ¶3.25.

¹⁰ Draft Guidance, ¶3.26.

¹¹ Draft Guidance, ¶3.26.

Suggested Amendment:

The Guidance should provide additional clarity on the difference between outcome-focused and action-focused CRs. Outcome-focused CRs should only be imposed where achieving the outcome is within the unilateral control of the SMS firm, and action-focused CRs are necessary to provide further detail where outcomes are hard to achieve.

Specific metrics and benchmarks should be consulted on and precisely defined before the relevant outcome-focused CRs are implemented and included in compliance reporting requirements.

20. **The CMA’s wide discretion to impose CRs on non-designated activities should be subject to clear guiding principles.** The DMCC Act permits the CMA to impose a CR that applies to an SMS firm’s conduct in an activity other than the relevant digital activity.¹² It may do so only to prevent an SMS firm from carrying out the non-designated activity in a way that is “*likely to materially increase the SMS firm’s market power or materially strengthen its position of strategic significance in relation to the relevant [designated] digital activity.*”¹³
21. This CR category is significant as it enables the CMA to regulate activities and conduct that do *not* fall within the scope of a designated digital activity. For example, it might be used to prohibit self-preferencing *of* a designated activity within a non-designated activity (*e.g.*, a challenger service with a small market share could face constraints on how it operates that would make it harder to compete against incumbents).
22. Widespread use of this CR category could risk deterring innovation and inhibiting genuinely pro-competitive conduct in challenger services, such as product integrations that benefit end users or business users. The Government’s consultation itself recognised that firms using their activities in one market to enter or expand in another can be pro-competitive.¹⁴
23. Accordingly, the CMA should not use this CR category to enjoin or deter potentially pro-competitive conduct. The CMA should also ordinarily use this CR category only in respect of non-designated activities that nonetheless have significant market power or a dominant position, including as a result of integration into a wider digital ecosystem. Indeed, this is arguably an implicit requirement before conduct can be found “*likely to materially increase the SMS firm’s market power or materially*

¹² DMCC Act, s. 20(3)(c).

¹³ Draft Guidance, ¶3.13.

¹⁴ Government Consultation Response, ¶63 (“*But we recognise that leveraging is not inherently problematic or anticompetitive, and that firms with a strong position in one market may present a healthy disruptive force to an adjacent market in which a different incumbent has market power.*”).

strengthen its position of strategic significance” as required by section 20(3)(c). These principles should be reflected in the Guidance.

Suggested Amendment:

The Guidance should make clear that the CR category under DMCC Act, section 20(3)(c) should not be used to prevent pro-competitive product integrations or other beneficial behaviour. It should also make clear that it will ordinarily be used only where the non-designated activity nonetheless has significant market power or a dominant position.

24. **The Guidance should provide for reasonable implementation periods.** The Draft Guidance provides that “[a]lthough some CRs may come into force immediately, where appropriate to do so, the CMA may provide for a period of time between the date that it imposes a CR and the date the CR comes into force.”¹⁵ Once the scope of a rule is communicated to a designated SMS firm, a process of legal interpretation, product design, and technical implementation will be required. Such processes require internal resource allocation and work that will take time even for well-resourced companies. Implementation periods will therefore be required for the majority of CRs.
25. To illustrate, under the EU’s Digital Markets Act (**DMA**), the European Commission published its first draft of the DMA in December 2020, which included the list of core platform services and clear thresholds that already allowed firms to know with a fairly high degree of certainty which services would be in scope and subject to the rules. The eventual substantive obligations then started to apply to the first gatekeeper firms in March 2024, around three and half years later. Given the breadth of the DMA’s rules and the complex products they apply to, our experience was that even this multi-year period required intense compliance planning, engagement, and implementation throughout.
26. The CMA should take this into account when it sets compliance deadlines for CRs. In particular:
 - The CMA should not hold designated firms to unduly strict evidential burdens when they justify how much time they will need to implement various CRs. This will require an element of judgement from the designated firm, which is best placed to make such an assessment.
 - The CMA should prioritise landing on compliance solutions that work well for designated undertakings, users, and business users, as opposed to rushing the launch of a suboptimal solution.

¹⁵ Draft Guidance, ¶3.59.

- The CMA should consider the impact on SMS firms of planning for a large number of CRs at once. Although the Draft Guidance provides that the CMA may allow for a staggered approach in these circumstances, in practice SMS firms may require extended implementation periods overall given the added burden of designing several solutions simultaneously.
- The CMA should be flexible in granting extensions to implementation periods where SMS firms can demonstrate that extra time is reasonably necessary. For example, implementing compliance within the set period may prove difficult or impossible if effective implementation requires the involvement of third parties or other matters beyond the SMS firm's control.

27. In addition, the CMA could provide implementation periods for other requirements imposed under the regime, such as pro-competition orders (which are necessarily more intrusive than CRs).

Suggested Amendment:

The Guidance should adopt a flexible approach to implementation periods that reflects the extensive burdens that implementing multiple CRs at once can create for SMS firms. The Guidance should also reflect the possibility for similar implementation periods to be applied to other requirements, rather than just CRs.

II. The Role of Consumer Benefits Should Be Clarified

28. Under the DMCC Act, the CMA must have regard to consumer benefits when imposing CRs and may take into account user and customer benefits in assessing whether to make a PCI. Neither the DMCC Act nor the Draft Guidance provide sufficient clarity on the role these benefits will play.
29. The DMCC Act requires the CMA to have regard to consumer benefits that would likely result from a CR or a combination of CRs.¹⁶ The Draft Guidance gives examples of lower prices, higher quality goods and services, and a greater range of products and services.
30. The Draft Guidance does not, however, identify the criteria by which consumer benefits will be considered *before* imposing a CR or a combination of CRs. This absence of precise standards for the evaluation of consumer benefits may lead to uncertainty and inconsistency in the application of CRs. In particular:
- The CMA should provide examples of evidence SMS firms could put forward to the CMA when it is considering whether (and if so, what) CRs should be imposed, as well as the standard against which the evidence will be evaluated.

¹⁶ DMCC Act, s. 19(10).

- The Draft Guidance refers to consumer benefits, but does not take into account benefits to other stakeholders such as business users. As a result, benefits to customers that are not end consumers risk being ignored when the CMA designs CRs, but may be taken into consideration in PCI investigations.

This omission is significant because many firms active in digital markets operate multi-sided platforms that involve different sets of users in addition to end consumers, such as web or app developers, original equipment manufacturers, sellers on a marketplace, businesses listed on platforms, and advertisers. It is well understood that, in such markets, conduct that may harm a group of users on one side of the platform (such as a high price) may be justified by benefits to customers on the other side of the platform (such as a lower or negative price).¹⁷

31. When assessing whether to make a PCI and considering the form and content of any PCI, the CMA may have regard to any user and customer benefits that have resulted or may be expected to result from the factors giving rise to the AEC.¹⁸ Similarly to CRs, the CMA could provide further clarity on the types of evidence that SMS firms could put forward to demonstrate user and customer benefits, and the standard against which the evidence will be evaluated.¹⁹

Suggested Amendment:

The Guidance should clarify the evidence that SMS firms can put forward to demonstrate consumer or customer benefits when imposing CRs or PCIs. The standard this evidence will be evaluated against should be clarified in the Guidance.

The CMA should take account of benefits accruing to users who are not consumers (e.g., business users) when designing CRs.

III. The Guidance Should Provide More Clarity on SMS Designation Process and Principles

32. Understanding the scope of services that may potentially be subject to CRs will be critical for SMS firms’ planning and legal certainty. This is especially the case when the CMA may draft broad CRs that can be imposed immediately upon designation. SMS firms need to be able to allocate sufficient resources to prepare for compliance

¹⁷ See, e.g., *Compare the Market Ltd and ors. v CMA* [2022] CAT 36, ¶118 (“[I]n two-sided platforms the price structure to get both sides on board and to optimise usage of the platform is usually asymmetrical, with prices on one side substantially above those on the other side.”).

¹⁸ DMCC Act, s. 46(2).

¹⁹ Draft Guidance, ¶4.38. The Draft Guidance currently does not provide much detail beyond the examples of lower prices, higher quality (including privacy, security and accessibility of products), and greater choice and innovation.

in respect of digital activities likely to be designated, well in advance of CRs applying to those digital activities. We make two main suggestions in this connection.

33. **The CMA should provide more guidance on grouping digital activities.** The DMCC Act adopts a broad definition of “digital activity.”²⁰ This leaves the CMA with significant scope to determine which services of an SMS firm will be subject to CRs.
34. The Draft Guidance would benefit from further detail on how the CMA will decide whether or not to treat two or more of the potential SMS firm’s digital activities as a single activity for designation purposes.²¹ Several principles remain unclear. For example:
- How will the CMA approach firms that operate two or more platforms that are distinct yet fulfil the same purpose (e.g., two different online marketplaces)?
 - In the above circumstances, must each activity individually fulfil the criteria for SMS designation?
 - How will the CMA take account of product changes or developments during its SMS investigation?
 - Will the CMA take account of previous definitions of digital activities (or equivalent concepts) under digital regimes in other jurisdictions?

Suggested Amendment:

The Guidance should provide additional clarity on the CMA’s approach to grouping digital activities or deciding that they are separate activities, and should specify the types of evidence that the CMA will take into account.

35. **The Guidance should specify relevant principles on turnover allocation.** The CMA explains that the turnover thresholds are designed to provide certainty to “*the vast majority of digital firms that they are not in scope of the regime.*”²² The Draft Guidance therefore needs to provide clear guidance on how to allocate turnover so that firms can understand whether they may be in scope.
36. The Draft Guidance notes that “[w]here company accounts do not provide a relevant figure, including where the accounts do not provide a suitable geographic breakdown of turnover, the CMA may use its investigatory powers to obtain relevant data from

²⁰ DMCC Act, s. 3(1).

²¹ Draft Guidance, ¶2.14.

²² Summary of draft digital markets competition regime guidance, p. 5.

*the undertaking.*²³ The Guidance should specify when geographic breakdown is not “suitable” (e.g., whether this is limited to the situation in which statutory accounts simply do not provide a geographical breakdown).

37. The Guidance should also acknowledge that different digital firms have different business models and it may therefore be appropriate to allocate geographic turnover in different ways. The CMA should allow for approaches by digital firms to differ depending on what best reflects the nexus of their digital activities (e.g., whether by location of the business user, the end user, or some other metric).

Suggested Amendment:

The Guidance should make clear that approaches to geographical allocation of turnover will depend on the business model of the digital firm, and it may be appropriate to take different approaches between firms based on what best reflects the nexus of a firm’s activities.

IV. The CMA’s Compliance and Information Gathering Powers Should Be Used Proportionately

38. **The CMA should rationalise and simplify SMS firms’ compliance reporting requirements.** The DMCC Act provides the CMA with considerable flexibility to direct SMS firms’ compliance reporting obligations. For example, the CMA will specify the manner, form, and cadence of the compliance report applicable to *each individual* requirement a firm is subject to. As a result, the same SMS firm may be subject to multiple requirements across multiple designated activities and, accordingly, face unduly complicated and fragmentary compliance reporting obligations. To rationalise this process, we make the following suggestions:

- First, the Guidance should reflect that the CMA will endeavour to align compliance reporting requirements and cadences across an SMS firm’s obligations. Irregular reporting patterns and different compliance reporting contents for different obligations could cause unduly complicated reporting obligations.
- Second, there should be proportionate limitations on the content of the compliance report and a clear framework for reporting requirements. Unduly complex reporting requirements risk creating inconsistencies across obligations and even across designated undertakings.
- Third, the Guidance could make provision for formal reporting requirements to be supplemented with less formal touchpoints, such as regular stocktake

²³ Draft Guidance, ¶2.30.

meetings with DMU staff with a view to reducing the frequency of formal reporting.

Suggested Amendment:

The Guidance should provide that the CMA will endeavour to ensure that compliance reporting obligations are aligned across a SMS firm's different requirements, in terms of both content and reporting cadence. The CMA should set out a clear framework for reporting requirements and consider whether formal compliance reporting mechanisms can be supplemented with less formal touchpoints.

39. **Consultations on compliance reporting obligations should usually take place during a requirement's implementation period.** The Draft Guidance states that the CMA will typically consult on the substance of compliance reporting obligations before imposing a relevant CR, and this consultation may take place while the CMA consults on the requirement itself.²⁴ Consulting on compliance reporting obligations at the same time as the requirements itself may not make sense in most circumstances, though, for the following reasons.
- First, compliance reporting mechanisms that enable the CMA to monitor requirements' effectiveness can likely not be settled (or reliably consulted on) until the CMA, SMS firms, and third parties know what those CRs are.
 - Second, providing feedback on compliance reporting obligations may distract relevant stakeholders when their resources are better spent considering and providing feedback on the substantive requirements the CMA is considering imposing.
40. A more appropriate time to consult on compliance reporting obligations may be during a requirement's implementation period (*i.e.*, the time between the CMA issuing a requirement and it coming into force).²⁵ This would give stakeholders an opportunity to comment on appropriate reporting requirements after a requirement has been finalised. In addition, SMS firms should be given a reasonable time to produce compliance reports after a reporting obligation is finalised, taking into account the scope of the obligations and the number of requirements the firm is subject to.

Suggested Amendment:

The Guidance should reflect that the CMA will ordinarily consult on compliance reporting obligations after it has finalised the requirement it is imposing (e.g., during the relevant implementation period). SMS firms should be given a reasonable time to

²⁴ Draft Guidance, ¶6.46.

²⁵ The Draft Guidance only refers to implementation periods in respect of CRs, but there is no reason it could not specify implementation periods in respect of other requirements such as PCIs.

produce compliance reports after a reporting obligation is finalised, taking into account the scope of the obligations and the number of requirements the firm is subject to.

41. **The CMA’s information gathering powers should be subject to more detailed guidance.** The DMCC Act grants the CMA unprecedented information gathering powers, including the ability to order firms to “*vary their usual conduct, whether in relation to some or all users of any service or digital content that they provide,*” or to “*perform a specified demonstration or test.*”²⁶ This could include, for example, demonstrating how an algorithm operates or performing a field trial of certain digital designs.
42. Such requests could go beyond mere “information gathering” and extend to requirements for firms to change their behaviour irrespective of whether the firm is designated as having SMS.
43. Requirements to change a firm’s behaviour and carry out *ad hoc* testing and field trials are liable to be burdensome. While the Draft Guidance sets out at a high level the factors the CMA will take account of when deciding to exercise this power (namely, value, feasibility, and proportionality),²⁷ it could go further in setting out specific circumstances in which the CMA will or will not exercise it.
44. For example, the CMA should ordinarily not order a firm to undertake testing if it has already taken similar testing in the ordinary course of business that can be used for the relevant assessment. The CMA should normally not require firms that are not designated (or subject to a SMS investigation) to change their behaviour or carry out tests. It should discuss in detail the feasibility and suitability of any testing that it may ask an SMS firm to conduct, before implementing any such requirement. And it should not order firms to test metrics and outcomes that have not been determined to be relevant for the purposes of compliance reporting.

Suggested Amendment:

The Guidance should provide more detailed indicia of the circumstances in which the CMA will order firms to change their conduct or carry out experiments or tests.

V. The Guidance Should Provide More Information Regarding the CMA’s Decision Making Processes

45. The DMCC Act affords the CMA considerable power to impose CRs and PCIs, investigate potential breaches of relevant requirements, and impose quasi-criminal

²⁶ DMCC Act, s. 69.

²⁷ Draft Guidance, ¶5.14.

penalties of up to 10% of global turnover if it considers the firm has breached a requirement.

46. In light of these significant powers, the Guidance should set out clearly the CMA's internal decision-making structure, and clarify the procedural safeguards that will be in place. While the Draft Guidance provides some details of responsibility for particular decisions, greater specificity as to the composition of—and interrelationships between—the various decision makers would provide greater certainty for firms.
47. Specifically, we make three main suggestions.
48. **The roles of the Board, the Board Committee, and any sub-committee(s) should be clearly defined.** The Draft Guidance sets out the decisions that must be made by the CMA Board, and explains which decisions may be taken by the Digital Markets Board Committee (**Board Committee**).²⁸ The Draft Guidance should provide details as to how these bodies will interact, given that many of the decisions are interrelated.
49. The Draft Guidance should therefore clarify:
 - How the different decision makers will interact with each other.
 - The role of any sub-committee(s), as there is currently no information as to how these will operate in practice.

Suggested Amendment:

The Guidance should include greater detail on how the decisions in ¶¶9.28 and 9.29 of the Draft Guidance will be taken, how these interrelate, and how relevant decision makers will interact.

50. **The composition of the Board Committee (and any sub-committee(s)) should be clarified.** The Draft Guidance does not provide details on the composition of the Board Committee, beyond stating that it must include the Chair and at least one Non-Executive Director, or two or more Non-Executive Directors. To promote accountability and facilitate dialogue between parties and the CMA, the Guidance should set out in more detail:
 - The membership of the Board Committee (*e.g.*, by including members with relevant experience or technical expertise).
 - How the CMA will ensure the Board Committee is appropriately resourced.

²⁸ Draft Guidance, ¶¶9.28 and 9.29.

- In which scenarios the Board Committee will consult with other officials or third parties, as is set out in, for example, the CMA’s guidance on investigation procedures in Competition Act 1998 cases.²⁹

Suggested Amendment:

The Guidance should include more information about the composition of the Board Committee and any sub-committee(s).

51. **The Draft Guidance should set out in what circumstances parties will be able to make representations to CMA decision makers.** The Draft Guidance does not contain any information on whether—and if so, in what circumstances—parties such as SMS firms will be able to make representations directly to decision-making bodies such as the Board Committee. The Guidance should set out the circumstances in which parties can engage directly with decision makers, and/or CMA staff undertaking the relevant investigation.

Suggested Amendment:

The Guidance should include more information on the circumstances in which parties will be able to make representations to decision makers rather than or in addition to CMA staff.

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²⁹ See CMA8, [Guidance on the CMA’s investigation procedures in Competition Act 1998 cases](#), ¶¶9.3 to 9.7.