From:

To: <u>DMGuidance</u>; <u>DMU</u>

**Subject:** Comment on CMA digital markets regime guidance

**Date:** 05 August 2024 10:31:41

## Dear consultation team

We appreciate that this response to the <u>consultation</u> on the Draft digital markets competition regime guidance (**Draft Guidance**) is well past the 12 July deadline. However, we have identified certain legal statements in the draft guidance that we consider to be incorrect, which are also repeated in the draft guidance on the CMA's jurisdiction and procedure in merger cases which is currently under <u>consultation</u>. It would be unfortunate if the two pieces of guidance contain inconsistent statements in this respect, or if the CMA had to issue a correction to the digital markets competition regime guidance, so we hope that our observation below can still be taken into account, notwithstanding its lateness.

Our specific observation relates to the concept of "carrying on business within the UK" in paragraphs 2.22 and 2.23 of the Draft Guidance. The following examples in paragraph 2.23 of the guidance make it clear that the CMA considers that an undertaking may be carrying on business in the UK even if it has no place of business in the UK, no physical presence and purely on the basis of direct or indirect exports of goods or services to UK users from another country:

- the goods and services supplied by an undertaking have UK users;
- an undertaking makes provision of intangible assets relating to a digital activity, such as the creation or provision of rights (eg intellectual property rights), available to UK users; or
- an undertaking does not directly sell goods or services in the UK but provides a key input or component for a good or service that is ultimately supplied in the UK (eg software chosen on the basis of UK customers/consumers' preferences which is integrated in a platform providing services in the UK).

The guidance cites the *Akzo Nobel* judgment of the Court of Appeal as support for this proposition. However, that is manifestly incorrect. Both the Court of Appeal judgment and the preceding CAT judgment that was upheld by the Court of Appeal explicitly state that correct legal position is in fact the <u>opposite</u>: that an undertaking <u>cannot</u> be considered to be carrying on business in the UK purely by reason that it exports goods or services to customers in the UK from another country. In the Akzo Nobel case, the Court of Appeal found that the UK subsidiary of Akzo Nobel "unmistakably" carried on business activities within the UK (see para 34 of the Court of Appeal judgment), and the question to be decided was whether the parent company's oversight of those activities amounted to carrying them on. Indeed, the CAT in that case expressly stated that it would not be correct to "conflate instances of trading in the United Kingdom and instances of trading with the United Kingdom" (paragraph 80 of the CAT judgment) and the Court of Appeal stated that, even where a company has a UK subsidiary that does carry on business In the UK "it would cast the net too wide to say that any involvement in such a business, such as the supply of goods to it from abroad, amounts to carrying it on" (paragraph 34 of the Court of Appeal

judgment).

It is clear from the two paragraphs cited above that an undertaking cannot be carrying on business in the UK if it has no business presence within the UK and <u>all</u> of the relevant business activities (e.g. producing goods or services, taking orders, despatching them to UK customers, arranging for a third party to deliver them to UK customers or hosting content on a server that can be accessed by UK customers) are performed <u>outside</u> the UK.

By eliding supplies of goods or services to UK customers with carrying on business within the UK, the examples also contradict other sections of the DMCC Act (such as the UK connection condition in the new s.23(4F) EA02, as inserted by Schedule 4, paragraph 2(5) DMCC Act) which make a clear distinction between activities carried on in the UK and supplies of goods or services to persons in the UK – such distinction being redundant if supplies of goods or services to persons in the UK invariably amounted to carrying on activities in the UK.

The examples are therefore incorrect and should be amended to clarify that carrying on business within the UK requires that acts of the SMS firm relating to the carrying on of the relevant digital activity take place within the UK. To the extent that the relevant acts are carried out overseas, they should fall to be considered under either of the requirement for a significant number of business users or the requirement for an immediate, substantial and foreseeable effect within the UK.

We will be making similar comments in respect of paragraphs 9.30 and 9.31 of the <u>draft</u> <u>guidance</u> on the CMA's jurisdiction and procedure in merger cases, which contain the same legal errors.

We would be happy to have a call with you to explain our observations above in more detail, if that would be helpful.

All the best,

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