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Associate General Counsel

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Competition & Markets Authority (“CMA”)
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Dear Sirs and Madams,

Consultation on new digital markets competition guidance: consultation response from DuckDuckGo

DuckDuckGo is a privacy technology company that helps consumers stay more private online. DuckDuckGo has been competing in the UK search market for over a decade, where it is the fourth largest search engine. We provide our comments on the new digital markets competition guidance from the vantage point of a company vigorously trying to compete against Google and needing a level playing field on which to do so.

DuckDuckGo strongly supports the new digital markets competition regime and is eager for the CMA and Digital Markets Unit (“DMU”) to be granted their powers so that SMS designations can commence and conduct rules can be drafted. The guidance is clear and the regime is thoughtfully constructed with the potential to release a wave of innovation and better consumer outcomes as long as the DMU has the appetite to construct bold remedies and provided the new regime is promptly implemented and enforced. We commend the thoroughness of the CMA’s market investigations and work to date in digital markets but we now need to see concrete changes: the CMA should mitigate the SMS firms’ delaying tactics from the outset as it builds its processes.

Our feedback addresses each chapter of the guidance setting out i) aspects we consider essential to make the regime a success and ii) aspects that could be adjusted to make the regime more robust.

Strategic market status including the CMA’s proposed approach to (a) substantive SMS assessment and (b) SMS investigation procedure.

- DuckDuckGo strongly supports the broad definition of a “Digital Activity” and encourages the DMU to group digital activities whenever possible since this will facilitate speedier designations. Many digital activities lend themselves well to this, for example, search and browsing are complementary activities that could (and should) be designated as a single digital activity.
- We welcome the CMA’s participative and transparent approach to consulting with challenger businesses. We believe that the regime’s effectiveness will be judged based on the remedies implemented and the speed of enforcement and that challenger businesses will play a crucial role here. Challenger businesses must be fully and properly consulted on remedies and on enforcement in the same way that is contemplated for designations, drafting of conduct rules and Pro Competition Interventions (PCIs). As such, we strongly support **equal disclosure and consultation rights** for challenger businesses. Equality of disclosure and consultation is critical to ensure that the real-world application of these remedies in the



marketplace is considered and that those engaged in the competitive marketplace have the opportunity to provide necessary feedback on solutions. It is a way to verify the accuracy of solutions proposed by SMS Firms with a vested interest in non-competitive outcomes.

- We note that the CMA plans to publish a “proposed decision” concerning designations, which interested parties may comment upon. It’s important that any “proposed decision” is published sufficiently in advance of the 9-month statutory deadline to allow interested parties to meaningfully comment.
- We strongly support designations taking place concurrently with the drafting of conduct rules and would also support PCI investigations being opened (or at least scoped out) while designations are taking place.

Conduct requirements including the CMA’s proposed (a) analytical approach to imposing CRs and (b) procedure for imposing CRs.

- DuckDuckGo strongly supports CRs applying to non-designated activities (for example, CRs that apply to Google’s anti-competitive revenue sharing agreements with OEMs) and PCI investigations being launched at the same time as conduct rules are drafted and implemented.
- We support the flexibility afforded via “outcome” and “action” focused CRs. We suggest that, where appropriate, outcome-focused CRs have a deadline and if the outcome has not been reached by that deadline, the DMU immediately moves to a more prescriptive action-focused CR. We also encourage the CMA to put detail into the “interpretative notes” that will accompany CRs to provide clarity for all parties, although we’re aware that these will not be legally binding.
- We also recommend that the DMU look at remedies implemented in other jurisdictions (for example the EU) when determining how prescriptive a CR should be. For example, where the equivalent of an outcome-focused CR was imposed under the DMA and has not been effective (which should be judged based on impact regardless of whether a non-compliance investigation has been opened), the DMU should be cautious of ineffective “copy-cat” remedies being implemented in the UK and should seek more prescriptive “action” focused CRs to address identified issues. For example, under the DMA, choice screens have been rolled out on Android devices, but these have not been effective since they were only shown to *new* devices, rather than *all* devices. Similarly, an “easy” switching obligation must explicitly require the SMS firm to create the default setting (if this does not already exist) and then allow competing firms to deeplink to this setting so that end users can change their defaults in one click. In each case, a prescriptive “action” focused CR is needed to prevent anti-circumvention. The converse is also true: where remedies have been effective in the EU (for example, the non-Android Chrome choice screen was rolled out to *all users*), they should not be watered down.
- We also strongly recommend that the DMU includes explicit anti-circumvention provisions in all CRs and PCOs since our experience in the EU is that there continue to be multiple friction points in both the compliance mechanisms implemented (for example, choice screens) and also on the operating system and browser (Android and Chrome), that undermine the effectiveness of the DMA.
- We note that the guidance states that “*The CMA may ask an SMS firm to provide it with a written plan on how it intends to comply with a CR in advance of the CR coming into force*”. Where there are multiple ways for the SMS firm to comply with the CR (which will almost always be the case with “outcome” focused CRs but may also apply to “action” focused CRs), the SMS firm should be required to provide a compliance plan, this should not be optional. This written plan must also be shared with those interested in the CR so that they can comment upon it.
- Further, the SMS firm must be required to “constructively” engage with beneficiaries/competitors who may be impacted by the CR and we strongly recommend that the DMU supervises and guides this engagement, for example, by providing deadlines for the SMS firm to respond to comments from

beneficiaries and taking an active role in any workshops that may be organized, including indicating what is compliant. It's critical that remedy proposals are iterative, with the ability for competitors to comment and the SMS firm having to justify its decisions vis-à-vis the goals of the regime. This is the root cause of some of the DMA remedies not being effective enough.

- Concerning compliance reporting, SMS firms should be required to explain the link between the law/the competition requirement and their compliance remedy. We emphasize that full compliance reports should be published rather than just summaries and, where possible, for example, where SMS firms are subject to the same or similar CRs, KPIs should be used to measure the effectiveness of each SMS firm's compliance solution.

Pro-competition interventions including the CMA's proposed (a) analytical approach to assessing whether there is an adverse effect on competition, (b) analytical approach to designing PCIs and (c) procedure for PCI investigations.

- DuckDuckGo strongly supports Pro-Competition Orders ("PCO"s) as a necessary tool to address the market power of SMS firms. We agree that there should be no requirement for market definition and that testing, including replacing aspects of a PCO on a trial basis, and proactive iteration of remedies, will be essential.
- We also believe it's essential for the DMU/CMA to rely on relevant evidence gathered and analysis carried out in other cases, including market studies involving SMS firms, SMS investigations and conduct investigations to ensure that PCIs can swiftly progress.
- In the spirit of our comments above on equality of disclosure and consultation, the results of testing of PCOs (and any surveys) undertaken by SMS firms must be shared with competing firms/beneficiaries of the PCO and competing firms/beneficiaries must be given the opportunity to comment on the test results/surveys.
- We note that a PCO must be imposed within 4 months of the end of the investigation so if remedy testing would be helpful, this should be started early to ensure there's enough time to generate meaningful data and for the results to be analyzed by both the CMA and beneficiaries of the PCO.
- Monitoring Trustees are mentioned in the context of "Commitments" and "Voluntary Undertakings" by SMS firms, but we believe they could also play a useful role in monitoring PCOs and potentially also CRs. For example, where a PCO requires the creation of an API or access to data, a "technical" monitoring trustee could be appointed to ensure that the API works properly. This would also reduce the burden on the CMA/DMU.
- We are concerned that commitments could be used to circumvent testing and iterating on remedies in PCI cases since there is no reference in the guidance to the SMS firm being required to conduct testing before offering a commitment. The CMA should not hesitate to use its investigatory powers to require SMS firms to test remedies proposed by way of a commitment to ensure they are effective before accepting a commitment.

Investigatory powers.

- We agree that broad investigatory powers are essential for the success of the regime and encourage the DMU to use them liberally. We also encourage the CMA to ensure it can reject excessive, duplicative and/or unnecessary evidence from SMS firms which may lead to delays in concluding PCIs or drafting CRs.

- We note that the CMA can require a person to obtain or generate information that they would not otherwise collect or retain, including requiring them to perform a **specified demonstration or test**. This will be useful in the context of a PCI when testing of remedies will be essential. However, it's not clear how/when test results will be shared with competing companies/potential beneficiaries. Similarly, we note that skilled person reports can be requested by the CMA, but it's not clear who will have access to such reports? Will this include the SMS firm? If so, and where appropriate, we believe skilled person reports should also be shared with competing companies/beneficiaries so that each party has equality of information.

Monitoring including the CMA's proposed approach to (a) monitoring compliance, (b) monitoring effectiveness and (c) monitoring whether to impose, vary or revoke competition requirements.

- Monitoring compliance will be key to the success of the regime. We fully support regular reviews of PCOs by the CMA, and also the involvement of Monitoring Trustees. When gathering evidence, we encourage the CMA to work closely with the European Commission which may have relevant compliance information concerning the Digital Markets Act.
- DuckDuckGo supports the provision of separate compliance reports for each competition requirement and their provision on bespoke frequencies. For example, compliance reporting could be used to ensure that SMS firms provide competing firms with relevant data on choice screen selection rates and impression data. The absence of such reporting data increases the asymmetry of information between SMS firms and competing firms and is an essential part of monitoring compliance.
- We note that the guidance states that "*The Nominated Officer should engage as reasonably appropriate with relevant stakeholders (including users of the relevant digital activity to which the digital markets requirement relates) about the firm's compliance plans and any concerns about the SMS firm's compliance with the competition requirement*". It would therefore be appropriate for the identity of the Nominated Officer to be communicated to competing firms and for the Nominated Officer to be responsible for ensuring that reasonable **prior** written notice of both compliance plans and changes to compliance plans are provided to competing firms/beneficiaries and that questions are answered within a reasonable timeframe. For example, DuckDuckGo and other competing search engines waited over 2 months just to receive the slides presented by Google at Google's choice screen workshop in October 2023.

Enforcement of competition requirements including the CMA's proposed approach to (a) breaches of competition requirements and (b) enforcement of conduct requirements.

- The guidance states that when investigating a suspected breach of a competition requirement "*During an initial assessment, the CMA will generally provide the firm with an opportunity to comment on its compliance concerns, and to provide relevant representations or evidence, unless for example there are reasons of particular urgency not to do so. **The CMA will also engage with complainants and/or other relevant third parties to the extent it considers it appropriate to do so***". We consider that it will be essential to consult with beneficiaries of the competition requirement/competing firms and to share evidence with them. As set out above, we support the principle of equal consultation and disclosure.
- Where a confidentiality ring is used by the CMA, in addition to a condition of access that information reviewed by advisers is not shared with the firm without the consent of the CMA, it should also be a condition of access that information is only reviewed for a specific defined purpose which should be limited to the SMS firm exercising its rights of defense in relation to the non-compliance investigation.



DuckDuckGo.

- We encourage the CMA to publish all consents, in relation to Enforcement Orders, where competitors or beneficiaries are impacted.
- We note that a Final Offer Mechanism (FOM) may resolve breaches of CRs relating to payment terms but that FOMs may also be useful in the context of PCOs where FRAND terms are imposed.

Penalties for failure to comply with competition requirements.

- DuckDuckGo supports the CMA's approach to the imposition of penalties as a way to deter individual businesses that breach specific requirements from further breaches, and to ensure that all those subject to the regime understand the consequences of non-compliance.
- We support the CMA's intention to run a penalty case and an investigation into a suspected breach of competition requirements together and issue a provisional penalty notice at the same time as provisional findings of the breach (and where practicable take representations on both together).
- When parties run counter to the CMA's duty of expedition by seeking to delay the process by making late, duplicative or unnecessarily lengthy submissions, the CMA should consider this as an aggravating factor when imposing penalties.

Administration.

- When engaging in "Participative resolution", it's important to be clear about what's expected from SMS firms. For example, SMS firms should be required to present their compliance proposals to competitors and beneficiaries and then respond to feedback, justifying to both the CMA and competing firms why feedback has not been taken into account.
- Whilst we fully appreciate the statutory deadlines and the CMA's desire to move quickly, we request that challenger firms, with considerably fewer resources than SMS firms, are given as much time as possible to respond to consultations, including advance notice and draft information notices when appropriate.

We are grateful for the opportunity to give our views on the new digital markets competition guidance regime and we wish you all the best for the next stage.

Yours faithfully,

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