



## **Response of Epic Games to the Competition and Markets Authority's (CMA) consultation on draft guidance (Guidance) on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024 (Act)**

### **1 Introduction**

- 1.1 Epic Games<sup>1</sup> welcomes the passage of the Act and the CMA's comprehensive draft Guidance, which provides clarity on how the CMA will apply the Act while preserving the ability for the CMA to act flexibly in adopting appropriate measures to secure open and competitive digital markets in the UK.
- 1.2 The CMA should use its new powers to deliver on its excellent work in the Mobile Ecosystems Market Study Report (2022). Millions of developers and billions of consumers rely on mobile ecosystems to make a living and conduct important daily tasks. The CMA has compiled compelling evidence of how Apple and Google's grip over mobile ecosystems results in UK consumers experiencing less choice and paying more for apps and services, while developers in the UK are prevented from innovating and benefitting from a competitive marketplace.<sup>2</sup> The CMA has noted that Apple and Google were able to earn more than £4 billion of profits in 2021 from their mobile businesses in the UK over and above what was required to sufficiently reward investors with a fair return.<sup>3</sup> Prioritising measures to ensure the future economic growth of *all players* in the mobile app ecosystem – not just a couple of dominant firms with gatekeeper power – is an urgent issue that must be resolved.
- 1.3 The Market Study Report identified a range of possible interventions to tackle Apple's and Google's market power and harmful practices. Unfortunately, none of these practices has changed. Apple and Google retain parallel monopolies over app distribution and in-app payments, and prohibit developers from steering consumers to better deals and lower prices. As a consequence, developers continue to pay extortionately high commissions to Apple and Google, raising prices for UK consumers and harming innovation. Further delay in implementing the Market Study Report's recommendations will only allow Apple and Google to further entrench their market power and derive profits at developers' and users' expense.
- 1.4 The CMA should prioritise measures that create competition in app distribution and in-app payments, and remove anti-steering provisions.<sup>4</sup>
- 1.5 As Epic previously submitted,<sup>5</sup> the CMA should implement conduct requirements (**CRs**) that require Apple and Google to allow direct downloading of apps and third-party app stores. These requirements would support the 'open choices' objective and prevent Apple and Google from

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<sup>1</sup> Epic Games (**Epic**), maker of the immersive experience Fortnite, is headquartered in Cary, North Carolina, U.S. and operates more than 40 offices worldwide, including offices in London, Manchester, Leamington Spa, Newcastle, Guildford and Edinburgh. Epic develops software applications (**apps**). These apps allow millions of consumers in the UK to play Epic's video games on their mobile devices, where they can meet, talk, compete, dance, and even attend concerts and other cultural events. Epic's widely used "Unreal Engine" software is a key development tool for several sectors across the UK – including in engineering, medicine, architecture, as well as the creative industries and app development.

<sup>2</sup> See paragraph 1 of [Epic Games' response to CMA's Interim Report on Mobile Ecosystems](#).

<sup>3</sup> See paragraph 7.84 of the [Mobile Ecosystems Market Study Report](#).

<sup>4</sup> With particular focus on the remedies in section 8 and Appendix M of the [Mobile Ecosystems Market Study Report](#).

<sup>5</sup> See section B of [Epic Games' response to CMA's Interim Report on Mobile Ecosystems](#).

“restricting the ability of users to use products of other undertakings”.<sup>6</sup> The CRs should specify that Apple and Google must allow downloading of apps in a way that ensures parity of install sources without preferencing their own app stores, so that they do not engage in conduct that introduces additional friction in the download process (beyond the frictions involved when making downloads from their own app stores), or other encumbrances they do not face themselves. Once implemented, measurability of CRs will be key: monitoring should focus on objective indicators like the number of downloads from alternative app stores / sources or the number of consumers multi-homing in different app stores. The CMA should then iterate via engagement with both SMS firms and third parties, until the anti-competitive effects of Apple’s and Google’s conduct are eliminated.

- 1.6 The benefits that the digital markets regime can deliver are not abstract or uncertain – the CMA has a concrete opportunity to bolster competition and innovation in the UK. In May 2024, Epic announced plans to launch the Epic Games Store on iOS mobile devices in the UK at the earliest possible opportunity. The Epic Games Store will offer the same developer-friendly terms on mobile as it does on PC (including charging developers a lower commission than Apple and Google – and not charging a commission at all where a payment service other than Epic Direct Payment is used) and, as a result, will benefit consumers in the UK by giving them more choice. To date, it has been unfeasible to launch the Epic Games Store in the UK on mobile devices due to Apple’s and Google’s restrictions. Epic therefore looks forward to working with the CMA in the coming months to create the conditions that will enable it to realise these plans and offer consumers and developers new ways of accessing and distributing apps.
- 1.7 To ensure that competition requirements are effective, the CMA should consider lessons from other jurisdictions. It should evaluate Apple’s and Google’s attempts to avoid compliance with the Digital Markets Act (**DMA**) in the EU and orders from U.S. courts, as well as rulings by the Netherlands Authority for Consumers and Markets, the Competition Commission of India, and the Korea Communications Commission, to name a few examples. The common theme of all of Apple’s and Google’s reactions to global attempts to regulate their ecosystems is one of malicious compliance – paying lip-service to the restrictions imposed by regulation but subverting any intended impact by imposing new fees and shifting harmful conduct to other parts of their businesses. The CMA can build upon other regulators’ efforts by using the toolkit provided by the Act to introduce comprehensive, outcome-focused and prescriptive measures, which prevent Apple and Google from avoiding their obligations. The adaptiveness and flexibility of the regime, as well as the expertise contained within the CMA, means that the UK is uniquely placed to tackle complex issues of critical importance to promoting competition, such as consumer-friendly choice architecture and proportionate security measures.
- 1.8 In Section 2 below, Epic sets out its overall comments on the draft Guidance, focusing on the key themes which are critical to the effective functioning of the new regime. In the Annex, Epic sets out its detailed comments on specific paragraphs of the draft Guidance and, where appropriate, its suggested amendments.

## **2 Overall observations on the draft Guidance**

### Flexibility and discretion

- 2.1 The draft Guidance provides significant detail on how the CMA will apply the legal framework set out in the Act, including the key principles which will guide it in the exercise of its discretion to implement this novel regime. As noted in the draft Guidance, the CMA has the flexibility to apply the regime to the facts of each case, subject always to the appropriate checks and balances set out in the Act

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<sup>6</sup> See section 20(h) of the Act.

(including requirements to act proportionately and with appropriate public consultation before adopting any decisions).

- 2.2 The flexibility in the exercise of its discretion is vital to enable the CMA to deliver competition and fairness in digital markets. Digital markets are diverse, dynamic and fast-moving, and the CMA needs to be able to adapt its approach to designate, investigate and monitor these varied but often interlinked activities. For the CMA to succeed in effectively enforcing the new regime, the measures it adopts must be targeted and tailored to each case, with an ability to adopt an iterative approach to the imposition of remedies if necessary. Maintaining latitude in its decision-making ensures the CMA can course-correct to respond to changes in market conditions or the conduct of the SMS firm being investigated.
- 2.3 The likely candidates for SMS designation have a history of “moving the goalposts” in response to efforts by regulators to open digital markets to competition and to promote fairness. As one example, in the EU, Apple and Google have deliberately attempted to undermine the effectiveness of the DMA, forcing the European Commission to initiate non-compliance investigations within a month of obligations under the DMA coming into force, and announce findings of non-compliance after three months. It is essential that the CMA can respond to efforts by designated companies to circumvent competition requirements imposed under the Act in an agile manner. The flexibility and discretion built into the draft Guidance will enable this.
- 2.4 Crucially, proportionality is built into the DNA of the digital markets regime in the UK. Other jurisdictions’ ex-ante regimes, such as the DMA, rely on regulating entire companies, whereas the Act focuses on designating specific activities of those firms. Flexibility and discretion are critical to ensure that this approach does not disproportionately benefit designated firms by allowing them to undermine the intent of the regime through rapidly relocating the source of harmful conduct to undesignated locations – this is discussed in more detail below.

#### Timely and effective enforcement

- 2.5 The swift response of the European Commission to the early indications of non-compliance with the DMA by Apple and Google sets a benchmark for the CMA when applying the Act, but also serves as a warning as to what the CMA can expect from designated firms. SMS firms will deploy tactics to halt or hinder the CMA’s progress. The CMA will need to act promptly and robustly, safe in the knowledge that the Act and the draft Guidance provide legitimate safeguards for SMS firms to ensure due process. Epic urges the CMA to implement as many of the remedies as possible as CRs from the outset to accelerate implementation of the regime and to address the harms caused by Apple’s and Google’s conduct without delay.
- 2.6 Epic welcomes the provisions in the draft Guidance which enable the CMA to implement the regime swiftly. An example is compliance with CRs, where the well-designed regime supports the possibility of imposing CRs at the same time as the SMS designation decision is issued (paragraph 3.45) and of bringing CRs into force immediately (paragraph 3.59).
- 2.7 However, the draft Guidance is light on the timeframes within which the CRs will typically come into force. Epic appreciates that the appropriate implementation timeframes are likely to vary on a case-by-case basis. However, early engagement with SMS firms during the SMS investigation and development of CRs should ensure that SMS firms can implement CRs shortly following designation. The CMA should be wary of SMS firms seeking to avoid compliance through protracted consultation on trivial issues. The CMA should also resist attempts by SMS firms to request unnecessarily long implementation periods for CRs. CR notices should typically stipulate as short a timeframe as possible so that appropriate guardrails are put in place promptly following designation. Epic has proposed amendments to this effect in relation to paragraph 3.62 of the draft Guidance. In rare

circumstances when longer implementation periods may be justified, the CMA should rely on its power to use transitory measures – such ‘interim measures’ will have an important role in ensuring that harmful conduct is partially mitigated before full compliance is required.

- 2.8 Furthermore, the CMA should feel empowered to use the full scope of its powers, including the ability to iterate interventions proactively and to impose additional (or more specific) requirements to ensure that SMS firms are not incentivised to delay or side-step compliance.
- 2.9 Effective enforcement will require the CMA to stay within the clear tramlines of the Act and not to allow SMS firms to ‘game the system’. For example, the CMA’s ability to test the implementation of pro-competitive intervention orders (**PCOs**) on a trial basis (section 51(3) of the Act) might, if not managed carefully, expose the CMA to prolonged discussions with SMS firms to ‘perfect’ the design of the specific requirements. Epic welcomes the pragmatic approach adopted in the draft Guidance of making a case-by-case assessment as to whether it is appropriate to test and trial potential remedies (paragraph 4.68). Epic also welcomes provisions in the draft Guidance incentivising early, effective engagement on pro-competitive interventions (**PCIs**), and the express statement that that the CMA may be unable to properly assess alternative remedies if they are proposed late in the process (paragraph 4.52). The CMA’s statement that it will typically not accept a commitment offered at a late stage of an investigation plays a similar role (paragraph 4.92). The Guidance in this area should be as strong as possible, to signal to SMS firms that they cannot undermine the CMA’s efforts to impose competition requirements promptly and efficiently by offering measures late in the process, and without giving the CMA the opportunity to appropriately scrutinise them.
- 2.10 Ensuring that the requirements are measurable and outcome-focused and monitoring their effectiveness will also be key to secure timely and effective enforcement. The requirements should be prescriptive and set clear quantitative targets – this can help with both the effectiveness and efficacy of the regime, by making it harder for SMS firms to side-step regulations. Where appropriate, the CMA should set objective indicators of market outcomes that CRs or PCIs are intended to achieve (for example, greater consumer switching or multi-homing between app stores). Accordingly, the CMA should monitor data that allows the impact of interventions on third parties (including competitors, business users and consumers) to be assessed, such as market share data. Epic has suggested other types of data that the CMA may use in the Annex. Objective and transparent indicators will also facilitate third-party engagement, by encouraging them to contribute their views on how market conditions could be improved. By contrast, over-indexing on CRs designed to promote behavioral change of SMS firms, without measuring progress against the desired market outcomes, will make it impossible to verify whether the requirements are effective. For example, changes that technically allow app developers to steer users to cheaper prices, but only under onerous and prohibitive terms, will not in practice address harmful behaviour and market power.

#### Participative approach

- 2.11 The draft Guidance envisions that the new regime will be implemented in a participative way. This is ensured through the many opportunities in the draft Guidance for the CMA to consult with a broad range of parties, including regulated firms, users, challengers and other third parties (for example, paragraphs 3.41 and 4.63).
- 2.12 However, the CMA should be cautious about adopting a piecemeal approach to third-party involvement. Extensive engagement with third parties will increase the range and quality of evidence available to the CMA and help address the clear information asymmetries between the CMA and SMS firms. The risk of relying on SMS firms for information is illustrated by Apple’s and Google’s pretextual security justifications, which they improperly claim support measures restricting the availability of alternative app distribution channels beyond their proprietary app stores. In response, Epic, amongst others, has been able to provide clear evidence that the choice between promoting

competition and security is not a binary one and that it is possible to identify alternative solutions that protect security without impeding effective competition.

- 2.13 Effective enforcement will require extensive collaboration between the CMA and regulated companies. It is particularly important to ensure that CRs and PCIs are practical and feasible, and that commitments are used where appropriate to ensure that the CMA's resources are efficiently deployed. Cooperation from designated firms will also be critical at the monitoring stage, and the CMA should impose strict requirements in this area to ensure that the information received from SMS firms is detailed and of high quality. However, the CMA must be careful to scrutinise responses and information received from SMS firms to ensure that they are not attempting to abuse the process and to 'water down' the requirements. Engagement (both formal and informal) with market participants in relation to the design and implementation of remedies will be critical to maximise the likelihood that interventions will be effective. For instance, the CMA would benefit from testing proposed PCIs with relevant stakeholders early in the investigation – this will ensure that the CMA moves to the consultation stage with more certainty that the proposed remedies will be proportionate, practicable and effective.
- 2.14 The more transparency the CMA permits throughout the process, the more informed third parties will be, and the greater the value they can add. In this context, Epic notes that third parties had an important role in assisting the CMA during the Mobile Ecosystems Market Study – and in helping the CMA grapple with some commercial and technical complexities.
- 2.15 To strengthen the participative nature of the regime and to promote transparency, Epic has proposed amendments in the Annex to assist the CMA in countering inherent information asymmetries between the CMA and designated firms, as well as between designated firms and business users.

#### SMS designation and the leveraging principle

- 2.16 There is a considerable risk that SMS firms may shift problematic conduct to avoid compliance with requirements imposed under the Act. To address this, the CMA should combine a holistic approach to SMS designation with the application of a strong "leveraging" principle in the design of its interventions (taking a broad view of the initial scope of remedies and addressing non-designated activities of SMS firms if they are being used to minimise the effectiveness of any remedies imposed). As the CMA is aware, companies such as Apple and Google operate complex, integrated business models, and their ability to implement harmful conduct stems to a large extent from their control over their entire ecosystems, and the various interlinkages and dependencies between activities within those ecosystems. SMS firms' presence (and market power) at different points in the supply chain enables them to leverage their position between different activities (including through the use of contractual restrictions on important customers or suppliers).
- 2.17 In terms of SMS designation, the new regime is intended to be targeted and proportionate. In addition, the definition of "digital activity" means that it will not be possible for the CMA to use one designation to cover all activities within a particular ecosystem. However, the CMA should refrain from taking an approach to designation that is too narrow and looks at activities in isolation. Zoning in on very limited aspects of an SMS firm's conduct may enable the SMS firm to shift problematic conduct elsewhere. This will undermine the effectiveness of any CRs, as the CMA may find it challenging to address harmful conduct that technically occurs outside the designated activity (even if it is closely related to the SMS activity). Accordingly, submissions by SMS firms to define digital activities in an inappropriately narrow way should be resisted. In this context, the CMA should use its power in section 3(3) of the Act (as described in paragraphs 2.13 - 2.15 of the draft Guidance) to group a firm's activities into a single digital activity where appropriate.

- 2.18 Alongside taking a holistic approach to SMS designation, the CMA will need to adopt a broad approach to CRs and consider how they may apply to various aspects of SMS firms' conduct. Although CRs must comply with the requirements set out in the Act, the CMA can rely on its broad discretion to use this instrument to regulate SMS firms. In this context, Epic encourages the CMA to formulate as many measures as possible as CRs to ensure that harmful conduct can be addressed as soon as possible. As noted above, where possible, the CMA should ensure that CRs are measurable and outcome-focused so that it is possible to verify whether there is clear behavioural change and whether the measures are effective against the desired outcomes. To assist in this, the CMA should use data that allows it to assess the impact on third parties.
- 2.19 It may be necessary to impose both CRs and PCIs to remedy harmful conduct. Epic supports the indication in the draft Guidance that a mix of CRs and PCIs could be appropriate in relation to the same issue. It would be helpful to add further clarifications to this effect in the Guidance, including that the CMA may pursue CRs and PCIs in tandem and to provide further examples as to when the CMA considers it appropriate to use these measures.
- 2.20 In addition to the broad design of initial remedies, the CMA may need to use its powers under sections 20(3)(c) and 46(3)(a) of the Act to intervene in relation to non-designated activities. As noted above, the CMA will need to be particularly alive to the risk of SMS firms trying to side-step the requirements imposed on them by shifting conduct to a non-designated activity. For example, in response to the DMA's prohibition on anti-steering provisions, Google has leveraged its market power in other areas to introduce new fees for steering, even where payments are executed outside of apps downloaded through the Google Play Store. If SMS firms avoid compliance by shifting their conduct, the CMA should make use of its wide powers to impose a CR "on activities other than the relevant digital activity" and to impose PCOs "in relation to the relevant digital activity or otherwise".<sup>7</sup> The CMA should also consider evidence of shifting when deciding whether to re-designate a digital activity more broadly. Overall, the Guidance should be strengthened in this area to send a clear message that shifting harmful conduct will not be tolerated and that the CMA will not hesitate to act if this occurs.

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<sup>7</sup> See sections 20(3) and 46(3) of the Act.

## Annex – Epic’s response to the CMA’s consultation on the draft Guidance – detailed comments

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
<b>Chapter 2 – Strategic Market Status (SMS)</b>		
<b><i>Overall summary of this section</i></b>		
<p>Epic welcomes the flexibility that the draft Guidance gives to the CMA, including in relation to the designation of SMS companies. This flexibility is required (given the novel nature of the regime and the issues considered by the CMA) to enable the CMA to effectively regulate digital markets to ensure they are open and competitive. The Act clearly envisages the CMA being granted significant flexibility and the draft Guidance rightly reflects this legislative mandate. The CMA’s wide discretion is also supported by the recommendations of the Digital Markets Taskforce.<sup>8</sup></p> <p>Epic has proposed various changes in relation to Chapter 2 of the draft Guidance, which are aimed, in particular, at clarifying the wording and ensuring that the regime can be delivered in an effective and efficient fashion.</p> <p>In particular, Epic wishes to flag to the CMA the risk that SMS firms may employ harmful, anti-competitive conduct across several interlinked activities or attempt to side-step compliance by shifting problematic conduct into non-designated digital activities (as has been the case in other jurisdictions, for instance in relation to Apple’s and Google’s ‘malicious compliance’ with the DMA in Europe). While the draft Guidance already seeks to address this risk to an extent, Epic has proposed a number of changes and clarifications intended to assist the CMA with responding to such efforts by SMS firms and to strengthen the ‘leveraging principle’. It will be vital that the CMA takes a holistic approach to designating SMS companies’ digital activities, accounting for various interlinkages and dependencies between those activities and adapting designations based on how SMS companies behave following initial designations.</p>		

<sup>8</sup> See Digital Markets Taskforce report [Appendix B: The SMS Regime: designating SMS firms](#) (8 December 2020), paragraph 5: “Flexibility is necessary to ensure that the SMS test can adapt to changing circumstances. This is important because the SMS regime needs to be future-proof and capable of meeting its goals as existing business models evolve and new business models emerge.”

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
<b>Identifying a digital activity</b>		
2.11	Identifying digital activities is a case-specific assessment and the CMA may vary its approach between investigations depending on the particular circumstances of the case.	<p>Epic welcomes the CMA's confirmation that it may vary its approach between investigations depending on the circumstances of the case and that identifying a digital activity is not to be treated in the same way as identifying a relevant market. This degree of flexibility will help the CMA ensure that the regime is implemented in a way that is tailored and targeted, which is in line with the aim of the legislation.</p> <p>Removing this paragraph may risk creating a legitimate expectation that the CMA will always approach identification of a digital activity in the same way (which may not always be appropriate, depending on that activity).</p> <p>That said, we also think that, in practice, drawing on principles that underpin a market definition exercise (such as those implied by the factors mentioned in paragraph 2.10 – e.g. assessing the supply and demand side of the activity) will be important, in particular because of the subsequent need to establish “<i>substantial and entrenched market power</i>” in respect of the digital activity identified, which implies the need for some consistency of approach in assessing the two concepts.</p>
2.13 - 2.14	<p><i>Grouping several of a firm's activities into single digital activity</i></p> <p>2.13 The CMA may treat two or more of the potential SMS firm's digital activities and the products within those as a single digital activity where either of the following conditions is satisfied: (a) these have substantially the same or similar purposes or (b) these can be carried out in combination to fulfil a specific purpose. This grouping exercise is not a separate step but is</p>	<p>Epic welcomes the CMA's clarifications in respect of its power to group a firm's activities into a single digital activity. Although Epic recognises the possible risks of taking an overly broad approach to defining SMS activities (which could be inconsistent with the intention for the Act to allow targeted interventions and focus on specific activities), Epic agrees with, and encourages, the CMA to interpret the conditions for grouping the activities broadly where appropriate.</p> <p>Epic's concern is that an overly narrow definition of activities could allow SMS firms to side-step regulation by shifting harmful conduct elsewhere</p>



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>rather embedded in the identification of a digital activity.</p> <p>2.14 The CMA will decide on the facts of each case whether or not to treat two or more of the potential SMS firm's digital activities and the products within those as a single digital activity for designation purposes. In doing so, the CMA will interpret the conditions set out in the preceding paragraph broadly. For example, the concept of purpose may refer to any relevant aspect of how the products are made, marketed, sold, accessed, or consumed, and may therefore relate to customer needs or preferences rather than technical complementarity.</p>	<p>in their respective businesses.<sup>9</sup> This tactic has been employed by Apple and Google in other jurisdictions and may prevent the CMA from addressing harmful conduct holistically. For example, in the EU, in response to the DMA requirements, Google has removed its 'anti-steering' ban on developers directing users to execute payments out of the relevant app downloaded from the Google Play Store. However, while Google has technically removed the anti-steering ban, it has effectively 'shifted' the anti-competitive harm by imposing a new fee structure for payments executed out of an app.</p> <p>The CMA should seek to reduce the risk of circumvention by SMS firms wherever possible (which we think will be better achieved in most cases by designating multiple digital activities at the same time but could on occasion be achieved by a single broader designation). In any event, Epic encourages the CMA to consider evidence around SMS firms' attempts to 'shift conduct' during subsequent designation investigations – as the ability to shift harmful conduct within the firm may suggest that different products or areas of business in fact serve the same purpose and / or should form part of the same digital activity.</p> <p>In addition, as discussed elsewhere in this response, it is critical that effective designation is coupled with the CMA applying a strong 'leveraging principle' in the design of its CRs and PCIs to enable it to address non-designated activities, where those are contributing to consumer harm.</p> <p>Finally, Epic welcomes the clarification that the concept of "purpose" may relate to customer needs or preferences, rather than merely technical complementarity.</p>

<sup>9</sup> Epic notes that the importance of flexibility as regards SMS designation and the imposition of CRs is reflected in the Digital Markets Taskforce's recommendations, see Digital Markets Taskforce report [Appendix C: The SMS Regime: the code of conduct](#) (8 December 2020), paragraph 83: "[A]n element of flexibility is necessary to ensure that effective implementation of the code of conduct cannot be unreasonably frustrated by an approach that identifies activities excessively narrowly."

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<b>Jurisdiction and turnover</b>		
2.18 - 2.21	<p>2.18 A digital activity carried out by a firm is linked to the United Kingdom if one or more<sup>13</sup> of the following criteria applies:</p> <p>(a) the digital activity has a significant number of UK users;</p> <p>(b) the undertaking that carries out the digital activity carries on business in the United Kingdom in relation to the digital activity; or</p> <p>(c) 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 on trade in the United Kingdom.</p> <p><sup>13</sup> Where the CMA finds that one of the criteria has been met in respect of a particular digital activity, it will not necessarily go on to consider whether the other criteria would also be met.</p> <p>(...)</p> <p><i>The digital activity has a significant number of UK users</i></p> <p>2.20 A 'UK user' is any user of the relevant service or digital content, including consumers or business users who it is reasonable to assume (a) in the case of an individual, is normally in the United Kingdom, and (b) in any other case, is established in the United Kingdom.</p> <p>2.21 The assessment of whether the number of UK</p>	<p>Epic notes that paragraph 2.18 of the draft Guidance reflects the wording in section 4 of the Act, which enables the CMA to find that a digital activity is linked to the United Kingdom if <u>at least</u> one of the three criteria set out in the Act is satisfied.</p> <p>In respect of the first condition, i.e. the activity having a significant number of UK users, Epic notes that the Guidance does not propose a quantitative threshold, and therefore the CMA's assessment of whether this condition is satisfied will be context dependent. Epic is, overall, supportive of this approach – setting an arbitrary quantitative threshold would mean that digital activities that are important for certain user groups could fall outside of the scope of the regime (if the absolute number of users is small). Still, given that the draft Guidance proposes a broad approach to establishing whether an activity has a significant number of UK users, Epic recommends the CMA should not typically rely purely on this criterion to establish jurisdiction, and should also consider whether any of the conditions in sections 4(b)-(c) of the Act are satisfied.</p> <p>Epic proposed a small change in paragraph 2.21 of the draft Guidance to clarify what is presumably the CMA's intention, i.e. that establishing whether an activity has a significant number of users compared to other undertakings would involve considering the number of users that other undertakings have in relation to the same (or a similar) digital activity.</p>

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	users is 'significant' is context specific. There is no quantitative threshold for how many users can be considered significant; the CMA's assessment may consider the firm's absolute position and / or the number of UK users it has relative to other undertakings <b>engaged in the same or a similar digital activity</b> .	
2.24	This criterion allows the CMA to consider conduct relating to the digital activity occurring outside of the UK, but which nonetheless is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom.	Epic would welcome a clarification regarding the CMA's intended approach to assessing whether the activity has an immediate, substantial and foreseeable effect on trade in the United Kingdom. Epic notes that the same test has been introduced to determine the jurisdictional ambit of UK competition law, in relation to Chapter 1 of the Competition Act 1998, further to section 119 of the Act. It would be helpful to clarify to what extent the CMA is intending to adopt the same approach to interpretation of this concept as between the Act and the Competition Act 1998.
<b>The Strategic Market Status conditions</b>		
Footnote 28 in paragraph 2.40	While market power is often thought of in the context of raising prices profitably, it can also relate to worsening quality, service, business modes and innovation, among others. As such, market power is relevant even where customers or users face a zero <b>monetary</b> price.	Epic welcomes the inclusion of footnote 28. To ensure precision, Epic has proposed the inclusion of the word " <i>monetary</i> " in this to clarify that, while many digital services are provided for £0 <u>monetary</u> price, they are not truly provided for zero consideration as users will often provide, for example, consent to data sharing in exchange for receiving the service. <sup>10</sup>
Paragraph 2.41 and footnote 29	Evidence relevant to market power may include indicators such as the level and stability of shares of supply, the number and strength of competitive constraints to incumbent firms, profitability levels and levels of customer switching. The CMA will	Epic welcomes the CMA's proposed wording at paragraph 2.41 and, in particular, the express recognition that integration of a company's products into a wider ecosystem may be an indication of market power in respect of those individual products. Indeed, we would go further and refer to interlinkages between products or services in the same

<sup>10</sup> See paragraph 3.27 of the "Unlocking digital competition" report of the Digital Competition Expert Panel (March 2019) (the **Furman Report**).

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
	<p>also consider evidence on the sources of market power, examples of which may include supply side factors such as network effects, economies of scale and scope, high fixed costs, data advantages, integration into wider ecosystems<sup>29</sup> <b>or interlinkages between products or services in the same ecosystem, the ability to advantage own products at different levels of the supply chain (including through the use of contractual restrictions on important customers or suppliers)</b>, or control of intellectual property, as well as (...)</p> <p><sup>29</sup> The word “ecosystem” is used to refer to a set of interrelated products and / or services offered by a single firm.</p>	<p>ecosystem (see proposed wording in red). It is Epic’s experience that big tech firms frequently control several levels of the supply chain and leverage their position to advantage their own products. In the case of Apple and Google, their control over mobile ecosystems is particularly important as it gives them the power to influence how users (both consumers and businesses) experience mobile devices. Accordingly, Epic also proposes to add further wording to indicate that the ability to leverage an undertaking’s power across the supply chain may be considered relevant to the assessment of market power.</p> <p>Epic notes that one of the relevant indicators of market power that the CMA will refer to are shares of supply. Given that the CMA is clear that it will not be conducting a formal market definition exercise, any use of shares of supply will need to be handled carefully to avoid them being open to challenge (given they will not be based upon a market definition). We wonder whether the CMA should also be considering other important indicators of market power, such as stability of pricing, levels of profitability etc.</p>
2.43	<p>As described above, assessing substantial and entrenched market power does not require the CMA to undertake a formal market definition exercise. <del>which often involves drawing arbitrary bright lines indicating which products are “in” and which products are “out”.</del> Instead, the CMA’s assessment will focus more broadly on the competitive constraints <b>(regardless of whether they might technically be “in market” or “out of market”)</b> applying to the potential SMS firm (...)</p>	<p>While Epic agrees that it is helpful for the CMA to clarify that it is not required to undertake a formal market definition exercise to establish market power, Epic would suggest adding some clarification about why market definition does not matter as such (rather than simply dismissing it as potentially arbitrary). In this context, Epic highlights helpful statements in the Digital Markets Taskforce’s report, which noted that the relevant evidence can be analysed without having to formally define the market, for example on the basis of customers’ or competitors’ views and evidence of customer switching. The report also stated that market shares can be calculated in different ways and interpreted without concluding on the relevant market.<sup>11</sup></p> <p>Further, it might be helpful for the CMA to also clarify the reasons for, and</p>

<sup>11</sup> See Digital Markets Taskforce report [Appendix B: The SMS Regime: designating SMS firms](#) (8 December 2020), paragraphs 32 – 34.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
		<p>the benefits of, a more flexible approach, in particular given the novelty of the regime and the complexity of digital markets. For example, we note that the Digital Markets Taskforce's report explains that a formal market definition exercise adds unnecessary complexity and "<i>encourages a narrow approach</i>", which makes it difficult to consider "<i>important interactions within an ecosystem of products</i>". The report concluded that this makes "<i>formal market definition particularly ill-suited to digital markets where firms may have developed complex ecosystems of interrelated products</i>".<sup>12</sup></p>
2.44	<p>(...) Where the CMA groups two or more of the firm's digital activities and the products within them into a single digital activity, the SMS assessment will relate to the grouped activity as a whole. In practice, the CMA may consider evidence relevant to market power of individual products and whether and how any interlinkages between these may contribute to market power across the digital activity, for example whether the firm's position in one activity in the group reinforces its position in another.</p>	<p>This is an important clarification on the CMA's future approach, which will support effective designation and enforcement. As the CMA is aware, Google and Apple operate complex business models, in which there are numerous interlinkages and interdependencies (for technical or commercial reasons) between various products and activities. Accordingly, considering these relationships between the different products will be critical in enabling the CMA to understand Google's and Apple's market power and conduct and address them effectively.</p> <p>However, the consideration of interlinkages should not only be limited to the situation described in paragraph 2.44. As Epic underlined in relation to paragraph 2.41, it is necessary for the CMA to consider the ecosystem nature of many digital platforms, and the impact on market power even where there are digital activities that are not being formally grouped together.</p>
2.45	<p>Substantial and entrenched market power is a distinct legal concept from that of 'dominance' used in competition law enforcement cases, reflecting the fact that the digital markets competition regime is a new framework with a different purpose. As a result, the CMA will not typically seek to draw on</p>	<p>Epic welcomes the CMA's clarification here and agrees that this concept of substantial and entrenched market power is distinct from dominance. However, Epic also welcomes the fact that, in footnote 31, the CMA makes clear that it will draw on evidence and analysis that might have been used to establish dominance in other contexts, given the significant overlap in the types of evidence relevant to establishing substantial and</p>

<sup>12</sup> See Digital Markets Taskforce report [Appendix B: The SMS Regime: designating SMS firms](#) (8 December 2020), paragraphs 32 – 34.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	case law relating to the assessment of dominance when undertaking an SMS assessment.	entrenched market power and dominance. This is clear also from the preceding paragraphs of the draft Guidance.
2.48	<p>(...) If post-designation developments or new evidence indicate that a firm's market power has – contrary to the CMA's expectations in its initial assessment – been significantly diminished, the CMA <b>is-able may decide to</b>, revisit its previous assessment and can consider whether to revoke the SMS designation.<sup>33</sup> <b>However, the timing of any review is at the discretion of the CMA, given that it is only obliged to complete a review prior to the ending of the five year designation period.</b><sup>34</sup></p> <p><sup>34</sup> Section 10(2) of the Act.</p>	<p>Epic welcomes paragraph 2.48 of the draft Guidance. It explicitly gives the CMA the ability to decide when it is most appropriate to act and how best to allocate its resources. There may be situations where such reassessment would be entirely inappropriate – for instance when little time is left until the expiry of the 5-year designation period.</p> <p>The proposed wording in red and the additional wording at the end of the paragraph is aimed at ensuring that the CMA avoids creating a legitimate expectation that it will conduct a full reassessment of a firm's SMS designation in the event that an SMS firm presents evidence post-designation that its market power has declined. It is also supported by the recommendations of the Digital Taskforce.<sup>13</sup> While Epic appreciates that the CMA will wish to revisit a given SMS designation if it is plainly no longer appropriate, the CMA should be cautious about creating an ability for SMS firms to easily challenge designations within the five-year period in the event of a change in circumstances. For this reason, Epic also welcomes the inclusion of paragraph 2.112, which provides that the CMA will not consider evidence submitted by a firm of a change in circumstances within 12 months of declining a previous request.</p>
2.46 - 2.48	<p>2.46 The CMA's assessment of whether an undertaking has substantial and entrenched market power must be forward-looking, over a period of at least five years – the length of the SMS designation.</p> <p>2.47 The CMA's starting point will be market conditions and market power at the time of the SMS investigation. From that starting position, the CMA will consider the potential dynamics of competition</p>	<p>Epic welcomes the CMA's clarification on how it will approach the assessment of whether there is substantial and entrenched market power. In particular, the inherent uncertainty involved in a forward-looking assessment should not preclude the CMA from taking action and finding that SMS firms satisfy this condition. In the event that circumstances change, or the market does not develop in the way that the CMA foresaw, the CMA will be able to rely on its ability to revisit the assessment, as set out in paragraph 2.48 of the Guidance.</p>

<sup>13</sup> See the Digital Markets Taskforce report [Appendix B: The SMS Regime: designating SMS firms](#) (8 December 2020), paragraph 106.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>over the next five years, taking into account any expected or foreseeable developments that may affect the firm's conduct in respect of the digital activity if the firm was not to be designated.</p> <p>2.48 As with any ex-ante assessment, there will necessarily be some uncertainty as to the future evolution of a sector. However, such uncertainty does not preclude the CMA from finding substantial and entrenched market power based on the evidence available to it when making its assessment. If post-designation developments or new evidence indicate that a firm's market power has – contrary to the CMA's expectations in its initial assessment – been significantly diminished, the CMA is able to revisit its previous assessment and can consider whether to revoke the SMS designation.</p>	
2.49 - 2.50	<p>2.49 When carrying out its assessment, the CMA will consider developments that may affect the firm's market power, including:</p> <p>(a) market developments such as emerging technology, innovation or new entrants. Evidence may include, for example, a firm's internal documents, business forecasts, or industry reports. (...)</p> <p>(b) regulatory developments, including regulation by the CMA that does not depend on the designation (for example CRs relating to a different digital activity), intervention by another regulator, or the</p>	<p>Overall, Epic welcomes paragraphs 2.49-2.50 of the Guidance, in which the CMA provides further information on its likely approach to revisiting the initial assessment of market power if the circumstances change.</p> <p>In relation to subpoint 2.49(a), Epic would note that some firms' internal documents may have been prepared with the well-trailed Act (and legislation adopted earlier elsewhere in the world) in mind and so the utility of certain set-piece documents may be limited (although internal communications associated with the preparation of those documents may be more revealing).</p> <p>In relation to subpoint 2.49(b), the CMA should be cautious when considering the impact of regulatory developments on reducing market</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>introduction of other legislation.</p> <p>2.50 In considering these developments, the CMA will not seek to make precise predictions about the likely development of the industry. Instead, the CMA will consider whether relevant developments are likely to be sufficient in scope, timeliness and impact to eliminate the firm's substantial market power.</p>	<p>power and should only do so where there are clear, well-evidenced reasons indicating that such developments will impact market power in practice (rather than automatically assuming that regulations have the intended effects). For instance, Epic considers that Google's and Apple's sham implementation of their DMA obligations has delayed achieving fairness and contestability in their respective mobile ecosystems.</p> <p>In relation to paragraph 2.50, we note that this type of assessment is not dissimilar to the assessment of dynamic counterfactuals in merger decisions and that the CMA could draw on its experience in that context when making dynamic assessments under the Act.</p>
2.52	<p>As such, where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched, where there is no clear and convincing evidence that relevant developments will be likely to dissipate the firm's market power.</p>	<p>Epic supports the inclusion of this paragraph in the draft Guidance, given the likelihood that evidence on the extent of market power will also be relevant to an assessment of whether a firm's market power is non-transient. The CMA should not be required to adduce separate, additional evidence demonstrating that market power is "<i>entrenched</i>" if this is demonstrated by evidence that has been adduced in support of the finding that a firm's market power is substantial.</p>
2.55	<p>This condition covers the potential SMS firm's size or scale in respect of the digital activity and can be assessed by looking at a wide range of metrics, not all of which will be relevant in every case. Examples of metrics the CMA may consider include:</p> <p>(...)</p> <p>(c) the number of <b>downloads</b>, purchases or transactions made through the digital activity;</p> <p>(...)</p> <p><b>(f) data on users' default settings or the frequency with which preinstalled apps are uninstalled.</b></p>	<p>Epic welcomes the CMA's clarification at paragraph 2.55 that subparagraphs 2.55(a)-(e) provide a list of examples of metrics that the CMA may consider (and that the list is, therefore, non-exhaustive).</p> <p>Epic has proposed including a further example of usage at paragraph 2.55(c) (number of downloads). The number of downloads made through a digital activity may be an important indicator in certain circumstances – for instance, Epic understands that the vast majority of app downloads on Android devices are made via the Google Play Store, which is an important factor in assessing Google Play Store's market power.</p> <p>Epic has also proposed adding a further example of a possible metric, which relates to tracking users' default settings and the extent to which</p>



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
		users actively uninstall pre-installed apps. In certain digital activities, SMS firms may require their products to be used by default (including through pre-installation), which consolidates their market power and increases barriers to entry.
2.61	<p>The assessment is aimed at evidencing the potential SMS firm's <b>status position of strategic significance</b>, rather than <b>assessing its current conduct or</b> predicting its future conduct. Therefore, it will be purely an assessment of the potential SMS firm's ability and the CMA will not undertake an assessment of, or seek to predict, the firm's current or potential future incentives to extend its market power into other activities. Examples of potentially relevant evidence may include:</p> <p>(...)</p> <p>(b) the potential SMS firm's presence in certain digital activities which <b>makes-would facilitate</b> its entry or expansion into new areas <b>possible-or easier</b>. (...)</p>	<p>Epic welcomes the clarification that this condition is only assessing the ability of firms to extend market power, rather than their incentives to do so. Epic considers that the framing of this paragraph is consistent with the statutory condition under section 6(c) of the Act and is also consistent with the recommendations of the Digital Markets Taskforce.<sup>14</sup> Epic has suggested a couple of minor wording changes to clarify the meaning of the sub-paragraph (b) (and of the example provided). The current wording includes reference to making entry "<i>possible</i>" which seems a low bar given the statutory condition in section 6(c) of the Act refers to "<i>would allow</i>" not "<i>could allow</i>".</p>
2.62	<p>The firm's position in respect of the digital activity allows it to determine or substantially influence the ways in which other firms conduct themselves, in respect of the digital activity or otherwise</p>	<p>Epic welcomes the inclusion of examples of when the condition under section 6(d) of the Act may be met. In particular, it is helpful that the CMA has clarified at paragraph 2.62(c) that one way in which the fourth condition may be satisfied is where the SMS firm operates a platform where it determines which rules other firms should abide by to be present on that platform, for example by setting arbitrary review or data privacy standards. Epic notes that digital companies such as Apple and Google control entire mobile ecosystems, which gives them the ability to determine the rules that other firms should abide by if they want to be</p>

<sup>14</sup> See Digital Markets Taskforce report [Appendix B: The SMS Regime: designating SMS firms](#) (8 December 2020), paragraph 48: "[T]he ability of a firm to extend its market power in one activity into other activities is likely to indicate that the effects of a firm's market power are particularly significant and widespread".

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
		active in that ecosystem, and unilaterally determine the information and content accessible to users.
2.63 – 2.64	<p>2.63 The CMA does not have a prescriptive list of evidence that it will take into account in its SMS assessment and may rely on a range of quantitative and / or qualitative evidence, with the balance between the two varying across investigations. As explained above, the SMS assessment will reflect the specifics of each case. Therefore, the evidence used will depend on factors such as the firm's business model, the characteristics of the sector, the nature of competition and what relevant evidence is available (taking into account the statutory time limit within which an SMS investigation must be completed). These factors may vary greatly depending on the sector and the firm under investigation.</p> <p>2.64 (...) There is no set hierarchy between quantitative evidence, such as consumer surveys or econometric analysis, and qualitative evidence such as internal documents or statements of relevant firms.</p>	Epic welcomes the CMA's flexible approach to evidence gathering both in these paragraphs and in later chapters of the draft Guidance. While Epic appreciates that the CMA will wish to refer to internal documents from the relevant SMS firms, Epic urges a degree of caution when relying on such documents – as noted in relation to subpoint 2.49(a) above, there is a risk that such documents may have been prepared with the legislation in mind.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
2.65	During the SMS assessment, the CMA may rely on relevant evidence gathered and analysis carried out in other cases, including for example market studies involving potential SMS firms, or other cases under its digital markets functions or its other tools, where relevant. In doing so, the CMA will be mindful of when and for what purpose the evidence was initially gathered and consider the weight it should be given and the extent to which it should be updated or corroborated.	Epic is highly supportive of this provision, in particular so that the CMA can, for example, build on its excellent work in the Mobile Ecosystems Market Study. This avoids inefficient use of resources and will help the CMA to expeditiously implement the new regime. The CMA should resist any suggestion by SMS firms that it should entirely revisit its previous work.
2.66	As previously noted, the two SMS conditions are separate and will require separate assessments and findings. However, there may be evidence that is relevant to both; therefore, the assessment of each may inform the other. For example, shares of supply may be informative of whether a firm has substantial and entrenched market power in respect of a digital activity as well as whether it has significant size or scale in the same activity.	Epic queries whether shares of supply are the correct example here, given the inherent link between this type of evidence and market power. Despite the wording of the paragraph, the example suggests that the two conditions are in fact the same. We wonder whether an example related to profits (or something similar) might be more appropriate here.
<b>Procedure of a Strategic Market Status investigation</b>		
2.69	The CMA may also decide to begin an SMS investigation on the basis of: (a) its own research and market intelligence, for example through its digital markets horizon scanning and monitoring work <b>or as a result of information received through complaints;</b> (...)	Epic welcomes the sections in Chapter 6 setting out how the CMA will handle complaints. Epic considers it is important to state at an early point in the draft Guidance that the CMA should be able to rely on complaints as reasonable grounds for commencing an SMS investigation, and therefore proposes the additional wording in red at paragraph 2.69(a).

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
2.74	<p>The CMA may provide the firm with examples illustrating which products it currently considers to be included and excluded from the digital activity based on its current business model. However, reflecting in particular the fact that a firm may adapt its products over time and / or introduce new ones, this will not be an exhaustive list of products <b>and ultimately any product that falls within the description of a digital activity will be potentially subject to the SMS regime.</b></p>	<p>Epic welcomes the inclusion of this paragraph and, in particular, the recognition that a firm may adapt its products over time – this indicates that digital activities have to be identified in a flexible way using purposive definitions, so that they can cover relevant innovations, new products or restructuring made by SMS firms. It is Epic's experience that, in other jurisdictions, Apple and Google seek to appear to be compliant with regulations by making minimal changes to create 'new' products or 'new' terms and conditions, without fundamentally improving the reality of their respective offerings. It is important that an SMS investigation cannot easily be side-stepped through this type of behaviour and Epic therefore suggests that it is made clear that it is not for the investigated firm to decide whether or not a product falls within the description of a digital activity.</p>
2.97	<p>The CMA will conduct a further SMS investigation following the procedural framework set out in the Act and described above at paragraphs 2.70 to 2.91. In practice, the CMA may be able to conduct a further SMS investigation at a faster pace and complete it ahead of the statutory deadlines due to the information it will already have available as a result of the initial SMS investigation and ongoing monitoring.</p>	<p>In Epic's view, it is helpful that the Guidance explicitly states that the CMA may be able to complete a further investigation ahead of the statutory deadlines. This is critical to the effective functioning of the regime.</p>
2.108 - 2.112	<p><i>Early reassessment</i></p> <p>2.111 (...) Where a firm has made representations to the CMA that it should undertake an early further SMS investigation, the CMA will <b>consider the representations</b> and inform the firm whether or not it will do so. <b>However, the CMA will be under no obligation to open a further SMS investigation prior to the mandatory deadline.</b></p>	<p>Whilst Epic supports the CMA's discretion and the flexibility granted by the framework, including the right to make early reassessment of the designation before the expiry of a 5-year period, the CMA must be cautious in exercising this discretion. The CMA should only bring forward an SMS investigation where there are strong reasons and firm evidence to do so. Epic also considers that the CMA should be clear in its Guidance that whether or not to undertake an early reassessment is a matter for its discretion and it is under no obligation to do so. Epic has suggested some changes to paragraph 2.111 to reflect this.</p>

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
<b>Chapter 3 – Conduct Requirements</b>		
<p><b>Overall summary of this section</b></p> <p>Epic welcomes the CMA’s guidance in this chapter, particularly the degree of discretion granted to the CMA, and trusts that CRs will provide the CMA with a strong tool to address harmful conduct by the likes of Google and Apple. Epic considers that, in order to protect consumers and business users from further harm and to implement the regime without delay, it is vital that as many interventions as possible are formulated as CRs. Whilst CRs must comply with the conditions set out in the legislation, Epic calls on the CMA to rely on its discretion and the broad wording of the Act, to readily use CRs to address various types of Apple’s and Google’s conduct.</p> <p>Epic supports the CMA’s discretion in imposing various types of CRs, but strongly encourages the CMA to ensure that CRs are precise and prescriptive (where appropriate), and that the CMA readily uses its power to set outcome-focused CRs with clear quantitative targets for SMS firms. Similarly, where appropriate, the CMA should feel empowered to impose CRs and PCIs in relation to the same conduct. This will support effective enforcement and make it harder for designated companies to try to side-step compliance.</p> <p>Epic has made various suggestions in relation to the Guidance to strengthen the CMA’s ability to impose CRs promptly and reduce the ability of SMS firms to delay compliance. In particular, it would be helpful to clarify that the CMA will normally impose CRs in tandem with the designation decision and that any implementation periods will be as short as possible.</p>		
3.6 - 3.7	<p>3.6 The CMA may only impose a CR or a combination of CRs on an SMS firm if the CMA considers it would be proportionate to do so for the purposes of one or more of the following objectives which are set out in the Act, having regard to what the CR or combination of CRs is intended to achieve: (...)</p> <p>3.7 In addition, the CMA may only impose a CR which is of a permitted type. The Act specifies an exhaustive list of permitted types, which are: (...)</p>	<p>Epic notes that a CR must be of a permitted type and for the permitted purpose, further to the requirements of the Act, and it is vital that the CMA’s decisions on CRs fit within the framework set out by the Act, and therefore cannot be easily challenged.</p> <p>When considering the key principles set out in the Act and in paragraph 3.6 of the Guidance, Epic encourages the CMA to add a statement in the Guidance to clarify that ‘users’ covers both business users as well as consumers.</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
<b>Imposing conduct requirements</b>		
3.12	<p>The CMA may consider whether to impose or vary a CR (or combination of CRs) to address an issue and / or whether to launch a PCI investigation. In such cases, the CMA will select what it considers to be the most appropriate tool(s) having regard to all the relevant circumstances. This may include considering the nature and scope of the issue(s) under consideration, the nature, scope and purpose of potential interventions, and the statutory conditions that must be satisfied in relation to each tool. <b>For the avoidance of doubt, the CMA may impose a combination of CRs and PCIs in respect of the same digital activity, including in relation to the same conduct of the SMS firm.</b></p>	<p>It is important for the CMA to further specify that CRs and PCIs can be imposed together where appropriate. This will support the effectiveness of the CMA's interventions and will help address the difficulties posed by the interlinkages of digital activities throughout mobile ecosystems (as well as the fact that big tech firms may shift problematic conduct from a designated activity to a non-designated activity). For instance, as identified by the Digital Markets Taskforce, PCIs may be used to implement a more procompetitive remedy than is possible under CRs or to address a specific issue.<sup>15</sup></p>
3.13 - 3.15	<p><i>CRs applying to non-designated activities</i></p> <p>3.13 Section 20(3)(c) of the Act allows the CMA to impose a CR that applies to an SMS firm's conduct in an activity other than the relevant digital activity. Under this permitted type, the CMA may impose CRs for the purpose of preventing an SMS firm from carrying on activities other than the relevant digital 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 digital activity. This would include requirements to prevent the SMS firm from carrying out non-designated activities in a way that</p>	<p>Epic notes that the Act enables the CMA to impose requirements for the purpose of preventing a designated activity from "<i>carrying on activities other than the relevant digital activity in a way that is likely to materially increase the undertaking's market power, or materially strengthen its position of strategic significance, in relation to the relevant digital activity</i>". This creates the 'leveraging principle', which enables the CMA to intervene where necessary in relation to non-designated activities. In order to ensure effective enforcement of the regime, given the scope for entities like Apple and Google to utilise their ownership of entire ecosystems to shift and reinforce harmful conduct, it is vital that the CMA readily applies this principle. For example, in the EU, while Apple removed its previous anti-steering rules that prohibited developers from steering customers to execute payments out of an app, it has introduced a significant number of restrictions that mean that, in practice, developers</p>

<sup>15</sup> Digital Markets Taskforce report, [Appendix D: The SMS regime: the pro competition interventions \(publishing.service.gov.uk\)](#), paragraph 10-11.

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
	<p>is likely to reinforce or embed such market power and / or position of strategic significance <b>and may require the CMA to anticipate potential future conduct that is likely to have that effect.</b></p> <p>(...)</p>	<p>cannot freely steer their customers away from in-app payments. The European Commission provisionally found that this conduct breaches Apple’s obligations under the DMA.<sup>16</sup></p> <p>Epic considers that, to be effective, the CMA may need to anticipate future conduct outside of the relevant digital activity that might be used to avoid the effect of CRs imposed in relation to the relevant digital activity (rather than waiting to react). Epic has added some suggested wording in bold red font to the draft Guidance.</p>
3.25	<p>CRs may take various forms. A CR may specify the outcome the SMS firm must achieve (outcome-focused CR) or include actions the firm must take to achieve that outcome (action-focused CR). CRs may also vary in their level of detail. For example, they 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.</p>	<p>Epic is supportive of the inclusion of this provision and appreciates that CRs may vary in their level of detail and form. However, Epic would caution against the regular use of high-level CRs that do not include clear measurable targets, given the discretion that this would grant to SMS firms in terms of compliance.</p> <p>Epic’s experience in other jurisdictions is that any discretion afforded to the likes of Google and Apple in determining compliance with a remedy is likely to result in an interpretation that is favourable to them and lead to conduct that raises additional concerns. By way of example, Google has introduced new, alternative fee structures (including in South Korea, the EEA, the US and elsewhere) in response to attempts by regulators to introduce competition for in-app payments (by requiring Google to allow the use of alternative billing systems).<sup>17</sup> These new fee structures ensure that Google retains its monopoly in Android in-app payment solutions for digital content while also apparently ‘complying’ with regulations.</p>

<sup>16</sup> [Digital Markets Act \(europa.eu\)](https://digital-markets.ec.europa.eu), “Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act” (24 June 2024)

<sup>17</sup> Under these schemes, Google charges a commission of 26% or 27% (or 11% or 12% in certain circumstances) when an alternative billing system is used to make an in-app purchase of digital content within apps downloaded from the Google Play Store. Google continues to charge 30% (or 15%) where Google Play Billing is used to make an in-app purchase.

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
		Similarly, in response to the DMA, Apple forces developers wishing to (a) distribute their apps via alternative channels or (b) use a different billing provider, to accept new terms and pay a new and prohibitive Core Technology Fee (CTF), charged per install. The CTF is designed to capture revenue from apps downloaded outside Apple’s App Store and disincentivise developers from using or offering competing channels. Apple’s cynical approach to DMA compliance stifles innovation and defeats contestability.
3.26	<p><b>Principle 1:</b> Where a CR 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, the CMA will be more likely to impose an outcome-focused CR. This will provide the SMS firm with a clear outcome it must achieve, while allowing the firm to determine for itself how to do so.</p> <p><b>Principle 3:</b> When setting action-focused CRs, the CMA will <del>typically impose</del> <b>consider</b> higher-level requirements, based on the permitted types set out in the legislation. Higher-level requirements will allow for greater flexibility in the specific steps the firm needs to take to comply, which may support innovation <del>and involve less risk of unintended consequences.</del> <b>However, the CMA will also be mindful of the risk that greater flexibility may give rise to issues in ensuring compliance with the aim</b></p>	<p>In accordance with the preceding observations, the CMA should seek to include targets / objectives that the SMS firm must meet in an outcome-focused CR where possible. This will support monitoring the effectiveness of a CR, and help the CMA decide whether additional measures are required, such as more detailed CRs and / or a PCI. Including measurable targets to support an outcome-focused CR will also help to limit the scope for an SMS firm to side-step its obligations under a CR.<sup>18</sup> Where appropriate, the CMA should also feel empowered to set and consider criteria that relate to the impact on third parties – as this would help ensure that the intended outcomes relate not only to behavioural change but also have a real impact on the market and users.</p> <p>For the reasons set out in relation to paragraph 3.25 above, Epic would caution against the CMA typically using higher-level requirements to implement action-focused CRs. In Epic’s experience in other jurisdictions, giving greater discretion to SMS firms to determine what amounts to compliance involves a greater risk of unintended consequences (not less). Epic has suggested some changes to the drafting of the Guidance in relation to this principle to reflect this concern.</p>

<sup>18</sup> The risk of creating overly-narrow, tick-box rules that allow an SMS firm to side-step regulation was also specifically identified by the Digital Markets Taskforce, see Digital Markets Taskforce advice [Appendix C: The SMS Regime: the code of conduct](#) (8 December 2020), paragraph 20.



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p><b>of the CR, which might lead it to consider more detailed CRs (see Principle 4 below).</b></p> <p><b>Principle 4:</b> (...) The CMA will be more likely to impose more detailed CRs where a firm has failed to comply effectively with higher-level requirements, <b>including where a firm has been slow to implement a previous requirement, and / or where the CMA is doubtful that a higher-level requirement will result in the necessary changes in conduct by the SMS firm and / or</b> in circumstances where the CMA has identified clear and persistent existing issues which need to be corrected, and specific steps the SMS firm needs to take to do this.</p>	<p>Epic is supportive of the principle that more detailed CRs may need to be imposed in respect of SMS firms with a track record of poor or slow compliance. Epic has proposed the wording in bold red font to make clear that an SMS firm 'dragging its feet' over compliance ought to lead to more detailed, prescriptive CRs and has also added some wording to address the concern expressed in relation to the draft Guidance on Principle 3.</p>
3.27	<p>The CMA will apply these principles flexibly. In some cases, it may be that higher-level CRs need to be supplemented over time with more detailed requirements – depending on how effectively SMS firms comply with higher level requirements. Whilst in some cases it may be appropriate to move sequentially through the principles set out above, there may be situations where a more directive approach is merited from the outset.</p>	<p>Epic is supportive of this approach, as is reflected in its comments on paragraphs 3.25 and 3.26.</p> <p>It is necessary to keep the compliance and the effectiveness of CRs under review. In Epic's experience, it will also likely be important to move straight to Principle 4 in respect of certain SMS firms (for example, Apple and Google have a track record of circumventing legislative and regulatory requirements). Accordingly, the CMA should be clear that it has the ability to take a firm's track record of compliance into account when setting CRs and the explicit ability to supplement CRs over time.</p>
3.30(c)	<p>Having decided which CR(s) or combination(s) of CRs would be effective in achieving their intended aim, the CMA will then consider whether the CR(s) that it proposes to impose on an SMS firm would be proportionate. A proportionate CR or combination of CRs is one that:</p> <p>(...)</p> <p>(b) is no more onerous than it needs to be to</p>	<p>Epic welcomes this clarification regarding the CMA's proposed approach to proportionality, which Epic understands to be in line with the established legal test in English law.</p> <p>However, Epic is concerned that the inherent information asymmetry between the CMA and SMS companies may make the proportionality assessment challenging. Accordingly, the CMA must rely on its robust information gathering powers and the ability to consult extensively with</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	achieve its intended aim; (c) is the least onerous CR(s), where the CMA has identified multiple equally effective options that would achieve the intended aim; and (...)	third parties to ensure that it has the necessary evidence to make this assessment.
3.31	3.31 The CMA's assessment of these criteria will take into account the potential effects – both positive and negative – of a CR or combination of CRs on those most likely to be affected by it. Depending on the specifics of the CR(s) in question, these may include: (a) effects on the SMS firm, including the extent to which the SMS firm will need to make changes to its technical systems and / or business model, and whether this is the result of the SMS firm's previous conduct or decisions <b>that are the subject of the CR(s). In considering the effects on the SMS firm, the CMA may also compare any costs to the likely scale of harm caused to competitors and / or users of previous conduct;</b> (...)	Epic welcomes the CMA's intention to focus on the effects of a CR or combination of CRs on various relevant stakeholders. In addition to focusing on the immediate impacts of a CR on the stakeholders, Epic considers that the assessment of proportionality must consider the existing harm of the conduct that the CR(s) is directed at – as more onerous measures may be appropriate where the conduct in question has had significant adverse impacts on competitors and / or users. Epic has therefore proposed additional wording in bold red text.
3.33	In all cases, the CMA expects the SMS firm and / or other relevant third parties to identify the effects of CRs (...). <del>The CMA will assess submissions provided by all relevant parties in this regard and weigh these submissions having regard to the strength of the evidence supporting them.</del>	Epic considers that the CMA should not be pre-empting the weight it will grant to submissions, particularly when it is likely that SMS firms will have an informational advantage when making submissions on the effect and proportionality of CRs. Well-reasoned submissions from third parties should still be given adequate weight, in particular where the CMA can then use its information gathering powers to collect supporting evidence in order to test plausible effects highlighted to it by a third party.
3.35	The CMA will <del>typically seek to</del> impose an initial set of CRs as soon as practicable <del>following an SMS designation decision, which may occur at the same</del>	Epic supports the CMA's intention to impose an initial set of CRs as soon as possible following the designation decision in most cases. Prompt publication and implementation of CRs is crucial to protect users. In our

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<b>time as the SMS designation decision.</b>	view, this should be the default position and so the word " <i>typically</i> " should be removed from the Guidance and replaced with " <i>seek to</i> " in order to support faster enforcement. Epic suggested further changes to this paragraph to underline that CRs may be imposed at the same time as the SMS designation decision is made.
3.51	A notice imposing a CR may include transitional, transitory or saving provision. For example, the CMA may provide that a CR comes into force on a particular date, but that certain aspects of the CR have effect from a later date, to smooth the transition of the CR coming into effect for the benefit of the SMS firm and other relevant third parties.	Epic supports the CMA's ability to impose transitional and / or transitory provisions. This ability is crucial to ensuring that harmful conduct can be addressed promptly and without further delay. In circumstances where there are longer implementation periods (for a good reason), Epic invites the CMA to use its power to impose transitional measures.  In general, however, such transitional, transitory or saving provisions should not be used to delay enforcement and enable SMS firms to achieve only partial compliance for unnecessarily long periods of time. As further discussed in relation to paragraph 3.62 of the draft Guidance, the implementation period should be as short as possible for the SMS firm to achieve compliance. If a CR is being imposed, it is because it is considered proportionate to do so, taking into account the effect on the SMS firm. It should not then be typical for the CMA to delay implementation of the CR " <i>for the benefit of the SMS firm</i> ".
3.54	Interpretative notes will provide greater clarity over the CMA's interpretation of a CR, including how a CR may apply in particular circumstances. Interpretative notes may provide illustrative examples of types of conduct that the CMA considers would likely comply with a CR ( <b>including, where relevant, examples of the practices that a designated company should start doing or stop doing</b> ) and types of conduct that the CMA considers would be unlikely to comply with a CR.	Epic is supportive of the inclusion of interpretative notes, provided that, where appropriate, the interpretative notes reflect the inputs and concerns flagged by stakeholders during the consultation process.  Epic has proposed including the wording in bold red to encourage the CMA to be more explicit in stating which current practices of a designated firm are unlikely to comply with a CR.
3.55	<del>Although interpretative notes will provide</del>	In Epic's view, the CMA should not be creating additional opportunities for

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<del>information about the CMA's interpretation of a CR, it will be open to the SMS firm to take a different approach where the SMS firm is able to demonstrate to the CMA that its approach complies with the terms of the CR.</del>	SMS firms to ignore CRs or the CMA's interpretation of those CRs. If a SMS firm does not agree with the CMA's interpretation, it could make representations to the CMA to persuade it to update the interpretative note. However, allowing SMS firms to ignore existing interpretative notes goes too far in Epic's opinion and creates opportunities for malpractice. On that basis, Epic would suggest removing this paragraph or, if something is to be retained, rephrasing it to the effect that the CMA will keep the interpretative note under review and reserves the right to amend it if provided with evidence to challenge its interpretation.
3.56	The CMA may update interpretative notes as appropriate while a CR is in force. For example, the CMA may update interpretative notes to reflect changing circumstances, including changes to technology. The CMA will typically engage with the relevant SMS firm and <b>other stakeholders third parties</b> before updating interpretative notes.	Epic supports this provision, as it is important that the interpretative notes are updated to ensure effective compliance and keep pace with technology. Epic welcomes the final sentence in paragraph 3.56 in particular, but would suggest that there is full transparency in relation to any proposed changes to ensure that all relevant third parties have the opportunity to comment before the CMA updates the interpretative notes (see the suggested changes in the paragraph opposite).
3.57	Where the CMA is planning to publish interpretative notes in relation to a proposed CR, the CMA will typically also publish a draft version of the interpretative notes at the same time as consulting on the proposed CR to aid parties' interpretation of the proposed CR.	Epic welcomes the CMA's confirmation in paragraph 3.57 that it will typically publish the draft interpretative notes at the same time as the consultation on the proposed CR, as this will enable all relevant third parties to comment on the draft notes at a relatively early stage of the process.
3.59	The CMA will determine when a CR comes into force. Although 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. (...)	Epic welcomes the clarification that some CRs may come into force immediately – this will ensure that harmful conduct of SMS firms is addressed promptly. This approach is also proportionate given that SMS firms will have time during the investigation to consider compliant mechanisms.  Where the CMA provides for a period of time to allow compliance, this should be as short as possible in order to achieve effective compliance.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
3.62	<p>As noted in paragraph 3.46 above, the CMA will typically consult on the appropriate length of any implementation period at the same time it consults on a proposed CR. The appropriate length of an implementation period will <b>typically be as short as possible for the SMS firm to achieve compliance (and may be immediate, as stated in paragraph 2.59 above), and will</b> depend on a number of factors including the complexity of the CR and any changes the SMS firm is likely to need to make to its technical systems and / or business practices to comply with the CR.</p>	<p>This is a critical provision which will ensure that the SMS firm is able to plan appropriately for when it should be complying with a CR from the point at which the consultation begins. As explained above, the implementation period should be as short as possible, taking this into account. In considering whether the proposed implementation period is proportionate, the CMA should feel empowered to consider the interests of various stakeholders, not just the SMS firm. For instance, the long-running nature of harmful conduct may mean that it is proportionate for the CMA to impose CRs with shorter implementation periods to try to redress harm as quickly as possible.</p> <p>In addition, the CMA should be wary of attempts by the SMS firm to 'sandbag' compliance by putting forward arguments as to why compliance might be difficult to achieve quickly. Apple and Google will drag their feet over compliance at every possible stage and will argue that compliance with regulatory requirements is too difficult.</p> <p>The CMA could consider a phased approach to compliance whereby the key outcome-focused CR is put in place almost immediately, to be followed shortly thereafter by more detailed measurable CRs supporting the outcome-focused obligation. This will ensure that the relevant SMS firm is prevented from continuing with harmful behaviour as quickly as possible and must demonstrate progress against the desired market outcome.</p> <p>Epic notes that the issue of the time required to comply with the CR would also have been considered by the CMA when assessing whether a proposed CR is proportionate and the 'least onerous' effective measure available. The CMA should consider managing expectations appropriately in the draft Guidance – Epic has suggested some additional wording in red. This will enable faster compliance with CRs.</p>

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
3.63	During this period, the CMA also expects the SMS firm to engage with relevant third parties who may be impacted by the CR. <b>The CMA may direct the SMS firm to liaise with specific third parties and / or categories of third parties.</b> 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.	Epic welcomes the inclusion of paragraph 3.63, as it will be important to ensure that SMS firms are required to engage with stakeholders who may be impacted by the CR. <sup>19</sup> Epic has proposed including the wording in bold red font to make clear that the CMA ought to have the ability to direct the SMS group to liaise with specific business users, as the big tech firms have a history in other jurisdictions of cherry picking which third parties they engage with.

## Chapter 4 – Pro-Competitive Interventions

### ***Overall summary of this section***

Epic welcomes the CMA’s approach in relation to PCIs as set out in the draft Guidance. PCIs will have an important role to play in the new regime, including in addressing issues that cannot be tackled through CRs. In particular, Epic considers that they have the potential to promote competition and innovation. As noted above, it may be appropriate for the CMA to impose a combination of CRs and PCIs in relation to the same digital activity, with the PCIs tailored to address harm that CRs cannot remedy.<sup>20</sup>

Epic made various comments in relation to this chapter to flag to the CMA various risks that it should be aware of, and to propose amendments aimed at strengthening and clarifying the Guidance.

For instance, in order to ensure that PCIs (and other requirements) are effective, the CMA should ensure that SMS firms are not able to unilaterally determine their effectiveness. It is therefore critical that the CMA liaises with relevant stakeholders on the appropriateness of possible remedies throughout the nine-month investigation period. Businesses using the services of SMS firms are likely to be particularly well-placed to assess the likely effectiveness of any proposed remedies. It may therefore be appropriate for the CMA to seek third-party input on proposed remedies in advance of public consultations on proposed Pro Competitive Orders (**PCOs**). The CMA should not just focus on consulting with SMS firms, as this would cause unnecessary delay and provide limited insights into the likely effects of the remedies. Moreover, SMS firms are incentivised to exaggerate the difficulty of implementing measures and argue that they would not be proportionate.

<sup>19</sup> The importance of working with third parties and industry stakeholders to establish “clear, trusted rules of the game in platform markets” is set out in paragraph 5.8 of the Furman Report.

<sup>20</sup> We note that this also appears to be the approach envisaged by the Digital Markets Taskforce, see Digital Markets Taskforce report, [Appendix D: The SMS regime: pro-competitive interventions](#) (8 December 2020), paragraph 11.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
4.3	There are some parallels between the legal tests and procedures which apply when the CMA is considering whether to make a PCI and those which apply when it is considering whether to make an intervention under the market investigation regime. In particular, the concept of an AEC is common to both. However, there are also differences between the legal tests and procedures which apply in both regimes. Therefore, while the CMA's approach to making PCIs may be similar in some respects to its approach under the market investigations regime, there will also be areas of divergence.	Epic welcomes the clarification that the legal tests and procedures which apply in the digital markets regime and the market investigation regime are different.  However, Epic considers that it might be helpful for the CMA to include further guidance as to how the legal tests and procedures may be similar as between the market investigation regime and the PCI investigation. <sup>21</sup> This could take the form of non-exhaustive examples to ensure that the CMA retains its flexibility.
<b>Assessing whether there is an adverse effect on competition</b>		
4.6	(...) for example, it may be a structural characteristic of a sector such as high levels of market concentration or high barriers to entry or expansion.	Epic notes that this approach is in line with the approach taken to identifying structural factors giving rise to an AEC in market investigations. However, it appears that the same factors may also give rise to an SMS designation in the first place. It may be worth providing clarification in this paragraph and including further non-exhaustive examples of circumstances that may lead to AEC. In this context, Epic flags that the Digital Markets Taskforce suggested examples referring to market features or practices by SMS firms. <sup>22</sup>
4.11	(...) For example, certain factors may be intrinsic to some extent, such that <del>the relevant digital activity cannot realistically be envisioned without them</del> there are no interventions that could directly <del>address</del> <b>remove</b> the factor itself, <b>only temper its effects</b> . In such situations the CMA may focus	Epic has suggested certain amendments to the paragraph to clarify what is meant. An SMS firm might argue that if a factor is so intrinsic that the digital activity cannot be envisioned without it, it cannot contribute to an AEC because, logically, there would be no digital activity without it.

<sup>21</sup> We note that the Digital Markets Taskforce expressly recognise the similarity with the existing AEC test used in market investigations (see [Digital Markets Taskforce report, Appendix D: The SMS regime: pro-competitive interventions \(8 December 2020\)](#), paragraph 79).

<sup>22</sup> See Digital Markets Taskforce report [Appendix D: The SMS regime: pro-competitive interventions \(8 December 2020\)](#), paragraph 78.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	more on what competition in relation to the activity may look like absent the effect of the factor rather than absent the factor itself.	
4.12	Typically, <b>however</b> , the indicators that the CMA will consider <b>when assessing whether there is an AEC</b> may include (but are not limited to) whether: (a) SMS firms' profits ( <b>which may require independent calculation or estimation by the CMA in the event that pre-existing reliable accounts are not readily available from the SMS firm</b> ) reflect a reasonable rate of return based on the nature of competition; (...)	Epic welcomes the fact that the list in 4.12 is non-exhaustive. It will be hard to anticipate in advance every indicator that might arise in a particular investigation. In relation to 4.12(a), Epic notes that assessing the profitability of companies such as Apple and Google in relation to their specific activities may be challenging because they do not publish the relevant data and do not always claim to have product-specific accounts. The CMA may need to use its information gathering powers to assess this criterion and take into account the potential for SMS firms to attempt to allocate costs from across their ecosystems to a particular activity in order to artificially deflate profitability.
4.12(c)	SMS firms and their competitors flex parameters of competition in response to rivals and wider developments, <b>including the time taken by SMS firms and their competitors to respond to such developments</b> ;	Epic welcomes the confirmation that the CMA may consider whether SMS firms and their competitors flex parameters of competition. In addition to considering the nature of SMS firms' responses to relevant developments, the CMA should have regard to the period of time taken for a firm to respond. For example, very long lag periods between a development and an SMS firm responding are likely to indicate a lack of effective competition in relation to the relevant activity. Epic has proposed wording in bold red font to address this concern.
4.12(d)	SMS firms' users and customers can make effective decisions between a range of alternatives and are able to switch between these;	When considering this indicator, the CMA should have regard to an SMS firm's unilateral ability to arbitrarily retaliate or discriminate against particular users, or categories of users, affecting their ability to access or use the relevant digital service, for example by changing terms and conditions or terminating a user's account. Epic considers that this conduct is a particular risk in digital markets where large firms are effectively able to continually rewrite the rules of engagement because of a lack of alternatives available to users / customers.



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
4.15	Finally, the CMA's assessment of whether there is an AEC will have regard to requirements that are already in place on the relevant SMS firm or soon to be implemented and the extent of their effectiveness in impacting any potential AEC. This includes for example any CRs on the SMS firm, interventions following from other PCI investigations as well as any requirements imposed under the CMA's other powers or the powers of other regulators.	Epic appreciates that the assessment of an AEC must be holistic, and that the analysis will depend on the specific facts of each case. Epic also understands that it will be appropriate to consider the impact that requirements already imposed on SMS firms have on the AEC. However, Epic considers that the CMA should be cautious in its assessment of the impact of relevant requirements, particularly in relation to requirements that are soon to be implemented. The CMA will not have any evidence on the implementation and effectiveness of the measures. Further, SMS firms may try to circumvent / minimise the impact of the requirements once these are imposed on them – which could lead to the CMA overestimating the impact of the requirements on an AEC.
4.16	(...) The CMA may make a PCI in any part of an SMS firm's business to address such an AEC. <sup>154</sup>  <sup>154</sup> <b>Section 46(3) of the Act.</b>	Epic proposes that the CMA specifically refers to its statutory power to make a PCI in relation to a relevant digital activity or otherwise. Epic has therefore proposed a new footnote 154 referring to the relevant section of the Act. As set out below, Epic proposes making a similar change in relation to paragraph 4.60 of the draft Guidance.
<b>Identifying an appropriate pro-competition intervention</b>		
4.29	Behavioural remedies may include interventions requiring the SMS firm to license its intellectual property or provide rivals with access to parts of its business or measures aimed at removing or reducing barriers to entry, expansion or switching. Non-exhaustive examples of behavioural remedies the CMA may impose include: (...) (c) requiring the SMS firm to ensure that its products, applications and services are interoperable with those of other firms. This may	Epic welcomes the non-exhaustive list of behavioral remedies listed at paragraph 4.29 and notes that remedies aimed at restricting any adverse effects of leveraging vertical relationships (such as those examples provided in (c) and (e)) and / or relationships arising from control of an ecosystem are likely to be critical. Companies such as Apple and Google are able to leverage their position in one activity in order to cause adverse effects on competition in another as a result of their control of their respective ecosystems. Epic has suggested referring to ecosystem relationships specifically in point (e).

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>include, for example, requiring that the SMS firm creates a new product or functionality, exposes some of its Application Programming Interfaces (APIs) or builds new APIs;            (...)            (e) remedies aimed at restricting any adverse effects of vertical <b>or ecosystem</b> relationships and mandating operational separation, including restriction of access to data and confidential information (firewall provisions);</p>	
4.36	<p>The CMA will encourage SMS firms to which the PCI investigation relates to engage on potential PCI options as early as possible and identify those that they consider most appropriate and / or least onerous on them, while explaining why these options would be effective in addressing the AEC.  <b>The CMA may also decide to test some of these PCI options with relevant third parties at an early stage, in order to help its assessment of the likely proportionality of measures it is considering.</b></p>	<p>Epic supports the CMA's early engagement with SMS firms to identify potential PCI options, as this will support efficiency and help ensure that PCIs are feasible and proportionate. However, it will also be important that the CMA appropriately tests a given SMS firm's proposals with relevant third parties at an early stage, so as to limit the risk that the SMS firm makes proposals which would not adequately address the AEC or proposals that would enable them to continue engaging in harmful conduct. Epic has suggested some wording in bold red font to that effect.</p>
<b>Pro-competition intervention procedure</b>		
4.41 - 4.59	<p><i>Pro-competition intervention procedure</i>            (...)            4.59 If the CMA decides to make a PCI, the PCI must be made within four months of giving the SMS firm the PCI decision notice. <b>During this period, the CMA may continue to engage with third parties to provide input in relation to the finalisation of the PCI.</b> This period can be</p>	<p>Epic welcomes the clarification that the CMA will seek inputs from third parties in relation to PCIs at various stages of the investigation, including in relation to the fact that the CMA may rely on information from external sources as a basis for launching a PCI investigation (paragraph 4.43I), the fact that the CMA will publish an invitation to comment at the outset of the PCI investigation (paragraph 4.54), the fact that the CMA will hold a public consultation on the final decision and will invite key third parties to make oral submissions (paragraphs 4.55 and 4.56) and the fact that the CMA must publicly consult on the terms of a PCO before making it</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	extended (...)	<p>(paragraph 4.63). Consultation documents must set out sufficient details and reasoning so that third parties can understand the proposals and engage with them effectively.</p> <p>However, as it stands, following the giving of a PCI decision notice, the only interaction with third parties in this (up to four-month) period will be in relation to a formal consultation on any draft PCO – see paragraphs 4.57 - 4.59. Epic would encourage the CMA to continue to engage with third parties during this important period outside of any formal consultation. Often the devil will be in the detail in relation to the implementation of remedies and the input of third parties will be important in ensuring that SMS firms do not use this phase to mitigate the potential impact of any remedy. Some suggested wording for paragraph 4.59 has been included in bold red font.</p>
4.49	<p>The CMA must give the SMS firm to which the PCI investigation relates a notice of the PCI decision ('<b>PCI decision notice</b>') resulting from the investigation on or before the last day of the nine-month period. <b>Where possible, the CMA will aim to provide the PCI decision notice in less than the statutory nine-month period.</b></p>	<p>Epic considers that, as PCIs will take up to a further nine months to implement following the nine-month SMS designation period, the CMA should be able to, where it can, make PCI decisions sooner. The inclusion of the language in bold red font is intended to avoid creating the expectation that the timeframe will typically take nine months and is in line with Chapter 6 of the draft Guidance.</p>
4.51	<p>Given the relatively short timeline for a PCI investigation, as set out above, the CMA anticipates that it will need to consider potential remedies from the outset of the investigation, alongside assessing whether there is an AEC. This is not to prejudge the AEC assessment, and such remedies discussions (<b>whether with the SMS firm or with relevant third parties</b>) will be held without prejudice to any AEC finding.</p>	<p>As set out above, Epic considers that it is important that the CMA has the benefit of inputs from relevant third parties. This input should be obtained as early as possible to ensure that any remedies that the CMA intends to propose are capable of remedying, mitigating or preventing the AEC in practice. Epic has therefore proposed the additional wording in bold red font to be clear that the CMA's early remedies discussions may be with the SMS firm and / or relevant third parties. Epic notes that this wording is consistent with paragraph 4.53 of the draft Guidance.</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
<b>Imposing, reviewing, replacing and revoking pro-competition orders</b>		
4.60	<p>As described above, a PCI can take the form of a PCO imposing requirements on the SMS firm <del>as to how it must conduct itself</del>. This can be in relation to the relevant digital activity or otherwise.<sup>176</sup></p> <p><sup>176</sup> <b>Section 46(3) of the Act.</b></p>	<p>Epic welcomes the provision in the Act that PCI interventions may be imposed in relation to the relevant digital activity or otherwise, and an explicit mention of this in the draft Guidance. By way of general comment, it is critical to the effectiveness of the regime that, where appropriate, the CMA imposes PCI interventions in relation to non-designated activities. This is particularly important given that SMS firms may try to shift harmful conduct to avoid regulation that is too targeted.</p> <p>Epic proposes that the CMA specifically refers to its statutory power to make a PCI in relation to a relevant digital activity or otherwise. Epic has therefore proposed a new footnote referring to the relevant section of the Act.</p> <p>Epic has also proposed removing the wording linking requirements to how the SMS firm must conduct itself, given the potential for this wording to be linked only to behavioural remedies.</p>
4.63	<p>The CMA must publicly consult on the terms of a PCO before making it. This duty to consult may be satisfied by consultation on the proposed PCI decision where it contains a draft PCO, provided that the CMA proposes to make a PCO on the same or materially the same terms as the draft PCO. The CMA will typically engage with the SMS firm and any key third parties on the design and terms of the PCO, <b>and will typically do so potentially</b> in advance of the public consultation.</p>	<p>Epic welcomes this clarification, and strongly encourages the CMA's engagement on PCOs, and the details of the proposed implementation, with SMS firms and third parties. Epic considers that the CMA should generally endeavour to engage with the relevant stakeholders in advance of the public consultation to make sure the CMA has the benefit of their comments as soon as possible. This will also ensure that the PCO that is being consulted on is as effective as possible and that the CMA gets early views on potential issues relating to implementation.</p> <p>In order to benefit from stakeholder engagement, Epic proposes the changes in the wording marked in bold red font in the text.</p>
4.65	<p>The CMA may include specific provisions within a PCO imposing requirements to test and trial</p>	<p>Epic welcomes the ability of the CMA to test and trial remedies. However, it is important that the CMA ensures that testing and trialing</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	different remedies or remedy design options (on a time limited basis) before imposing any PCI on an enduring basis.	remedies is not used by SMS firms to delay compliance by arguing that the CMA should 'perfect' the remedy over prolonged periods of time. It is in the interests of effective enforcement that the CMA imposes remedies to address AEC and adjusts them iteratively as new information becomes available. The CMA should be skeptical of SMS firms' attempts to argue that testing would impose disproportionate burdens on SMS firms – SMS firms are well-resourced and have experience of trialing and testing various commercial proposals.
4.73	This ability to replace PCOs provides the CMA with the power to proactively iterate remedies, where appropriate to do so, in order to ensure that its remedies continue effectively addressing the AEC identified through the PCI investigation.	Epic welcomes the inclusion of this paragraph in the draft Guidance, as it will be important for the CMA to iterate remedies to ensure they remain proportionate and effective. Epic notes that in other jurisdictions, firms such as Apple and Google have argued that they comply with areas of the DMA by making minor changes to their business structures, without actually complying with the spirit of the legislation to address the relevant competition issues. Accordingly, it is important that the CMA has the ability to amend the remedies where appropriate. The process should be evidence-driven and encourage positive participation of the relevant stakeholders.
4.76	In certain circumstances, the CMA may consider it necessary to revoke a PCO entirely without replacing it. The CMA can exercise this power where it considers it appropriate to do so, having regard, in particular, to any change of circumstances since the PCO was made. For example, the CMA may consider it appropriate to revoke a PCO where new legislation comes into force which affects the PCO and related requirements on the SMS firm.	Epic considers that the CMA should interpret the impact of new legislation narrowly and only revoke a PCO where there are strong reasons to do so – for instance, where the new legislation overlaps or conflicts with the PCO. It is also necessary that the PCO is not lifted before the relevant legislation is implemented, so that there is no 'gap' in enforcement. There may also need to be some time allowed after the legislation comes into force to monitor the extent to which this leads to changes in conduct by an SMS firm that would merit the PCO being revoked.
4.82	The CMA may accept commitments: legally binding promises from an SMS firm as to its future conduct. A commitment can be structural or behavioural in	In principle, Epic supports SMS firms being able to offer commitments and broadly agrees with the process set out in the draft Guidance to support efficient allocation of resources, particularly the degree of

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>nature, or a combination of both. It is open to the SMS firm offering a commitment to do so in any form it chooses, including in relation to all of, or only part of, the AEC.</p>	<p>discretion that will be afforded to the CMA to determine whether commitments are accepted and the explicit statement that the CMA will generally not accept a commitment offered at a late stage of an investigation.</p> <p>However, Epic notes that any proposed commitments must be thoroughly tested by the CMA. Otherwise, there is a risk that SMS firms will suggest a solution that is not effective or potentially creates new harm, in circumstances where the CMA will then be unable to unilaterally vary the commitment or continue a PCI into the conduct to which the commitment relates.</p>
<p>4.86 and 4.95</p>	<p>4.86 This means that in practice, the CMA is likely to require a more extensive remedy than might be needed if the CMA were to impose a PCO at the end of a PCI investigation...</p> <p>(...)</p> <p>4.95 Before accepting a proposed commitment, the CMA must publicly consult on its intention to do so. The CMA must (a) publish a notice and (b) consider any representations made in accordance with the notice and not withdrawn. Such a notice will be published on the CMA's website <b>and will typically set out at a high-level what other possible measures could be imposed. The CMA will also typically set out in the consultation notice whether, and in what ways, the remedy offered by the SMS firm would be more extensive than if the CMA were to impose a PCO.</b></p>	<p>Epic welcomes the clarification provided in paragraph 4.86 and agrees with the CMA's proposed approach. In order to ensure that third parties can effectively comment on the proposed commitments during a consultation, it is necessary that the consultation document provided to third parties explains what other possible measures could be (even if at high level, given the early stage of the proceedings at which the commitments are likely to be proposed) in order to be able to assess whether or not the commitments are "<i>more extensive</i>". Epic proposes including the wording in bold red font in paragraph 4.95 to clarify this point in the Guidance.</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
<b>Chapter 5 – Investigatory Powers</b>		
<p><b>Overall summary of this section</b></p> <p>Epic welcomes Chapter 5 of the draft Guidance, which clearly sets out the CMA's investigatory powers aimed at enforcing the digital markets regime. Epic notes that those investigatory powers are largely aligned with the CMA's investigatory powers across its other activities.</p> <p>Below, Epic has highlighted a few areas which it considers are of particular importance to ensure that the CMA's investigatory powers are used efficiently and effectively. In particular, it is important to clarify that the CMA has broad powers in relation to information requests and to introduce further measures to support individual accountability of senior managers with respect to information notices.</p>		
<b>Investigatory powers</b>		
5.6 - 5.9	<p>5.6 Information may include documents, whether in draft or final form, as well as data, code, algorithms, estimates, forecasts, returns, explanations, demographic user data, financial projections <b>for designated activities, data showing costs attributable to the provision of specific services, profit data for designated activities, competitor assessment, switching data</b> or information in any other form.</p> <p>5.7 The power to require a party to give information to the CMA includes the power to:</p> <p>(a) take copies or extracts from information;  (b) require a party to obtain or generate</p>	<p>Epic is fully supportive of the CMA's novel powers to require information relevant to its digital markets functions and suggests that broad use is made of these. This is particularly important given that the practices that the CMA will be analysing are inherently complex and opaque.<sup>23</sup></p> <p>In paragraph 5.6, the CMA has helpfully identified different types of information that might be subject to an information notice. Epic has proposed some additional examples of specific types of information that the CMA may be likely to request for illustrative purposes in bold red. Epic notes that further examples were included in the Digital Markets Taskforce's report.<sup>24</sup></p> <p>Epic also notes the examples listed in paragraphs 5.8 and 5.9 of the draft Guidance and suggests that it may be helpful to add further examples to emphasise the broad nature of these powers by adding the wording</p>

<sup>23</sup> Digital Markets Taskforce report [Appendix E: The SMS regime: cross-cutting powers](#), paragraph 7.

<sup>24</sup> Digital Markets Taskforce report, [Appendix E: The SMS regime: cross-cutting powers](#), paragraph 9.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>information;</p> <p>(c) require a party to collect or retain information that they would not otherwise collect or retain;</p> <p>(d) if specified information is not given to the CMA, require a party to state, to the best of their knowledge and belief, both where that information is and why it has not been shared with the CMA.</p> <p>5.8 For example, the CMA may include in an information notice a requirement that a firm create, gather, aggregate or combine specific financial <b>or usage</b> information in a way which may be different to its existing internal practices, should this be required to inform its investigations.</p> <p>5.9 The CMA may also require a firm to obtain or generate information as to how its algorithmic code has changed over time, including through version control, <b>or other information on its software</b>.</p>	<p>marked in bold red.</p>
<p>5.10 - 5.14</p>	<p><i>Varying conduct or performing a demonstration or test</i></p> <p>(...)</p> <p>5.12. For example, the CMA could require a firm to demonstrate a technical process with examples, such as how an algorithm operates, or to undertake testing or field trials of its algorithms and report the outcomes.</p> <p>5.13 Another potential example of when the CMA</p>	<p>Epic notes the examples provided in paragraphs 5.12 - 5.13. Epic considers it would be helpful to expand on these examples so as to better reflect the broad nature of the CMA's power to gather information. To this effect, Epic suggested some additional wording marked in bold red.</p> <p>Epic notes and supports the factors listed in paragraph 14 which the CMA intends to consider when deciding whether to require a firm to vary conduct or perform a demonstration or test for information gathering purposes. Epic suggests that the CMA makes use of a skilled person as described in paragraphs 5.65 to 5.74 when assessing these factors. In particular, we think this would assist the CMA with the feasibility factor. As such, Epic proposes to include additional wording in paragraph 5.14,</p>



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>may require a firm to vary its usual conduct is when it may be necessary to assess the effect of, <b>for instance</b>, different choice architecture, <b>different display screens or different security restrictions</b>, and assess compliance with particular CRs.</p> <p>5.14 The CMA is likely to consider three overarching factors when considering whether to require a firm to vary conduct or perform a demonstration or test for information gathering purposes. <b>The CMA may require the use of a skilled person to assist with this exercise.</b> These factors are:</p> <p>(...)</p>	<p>marked in bold red.</p>
5.23 – 5.28	<p><i>Requirement to name a senior manager</i></p> <p>5.23 The CMA may include in an information notice a requirement for a firm to name an individual who it considers to be a senior manager and who may reasonably be expected to be in a position to ensure compliance with the requirements of the information notice.</p> <p>5.24 This requirement may apply in respect of an information notice which is sent to an SMS firm, a firm which is subject to existing obligations under section 17(1) or a firm previously designated as having SMS which is the subject of a breach investigation.</p> <p>5.25 An individual can be considered to be a senior manager of a firm if the individual plays a</p>	<p>Epic considers the CMA's ability to require firms to name a senior manager to ensure compliance with the requirements of an information notice a powerful tool to achieve the objectives set out in an information notice. In addition, naming a senior manager will help address some of the unavoidable information asymmetries between SMS firms and the CMA. The individual accountability will incentivise compliance and promote accurate responses.</p> <p>As such, Epic considers it critical that the CMA makes use of this tool as a rule rather than an exception, including imposing individual penalties where applicable.</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>significant role in –</p> <ul style="list-style-type: none"> <li>(a) making decisions about how the undertaking's relevant activities are to be managed or organised, or</li> <li>(b) managing or organising the undertaking's relevant activities.</li> </ul> <p>5.26 The CMA considers that a senior manager is likely to be an individual who is a senior executive or executive Board member, or an equivalent level of seniority in an organisation. The individual should have the necessary expertise, oversight and responsibility for the issue which is the subject matter of the particular information notice.</p> <p>5.27 Where the CMA requires a firm to name a senior manager, the information notice must require it to inform the individual of the consequences for the individual of any failure by the firm to comply with the notice.</p> <p>5.28 Where the CMA considers that the senior manager has failed, without reasonable excuse, to prevent certain failures or actions of the firm (relating to non-compliance with the information notice and / or to the provision of false or misleading information), the CMA has the power to impose a penalty both on the individual named as a senior manager, as well as on the firm itself.</p>	
5.70	The following steps will be taken when the CMA requires a firm to appoint a skilled person to	Epic notes the CMA has reserved the right to reject the proposed providers identified by a firm. Epic considers that one of the clear

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	<p>conduct a report:</p> <p>(a) The CMA will issue a notice requiring a firm to appoint a skilled person and specifying the scope and deadline for the report;</p> <p>(b) The firm should identify a shortlist of potential skilled persons (most likely three alternative providers) who will be subject to a tender process, which will be subject to CMA approval;</p> <p>If the CMA approves the options, the firm shall review the proposals received from each and choose which provider is their preferred choice. If the CMA rejects the proposed providers (<b>for example on the basis that they lack sufficient independence</b>), the firm may submit alternatives for consideration or the CMA may choose a provider directly.</p>	<p>grounds upon which the CMA might decide to reject a proposed provider is on the basis that they lack independence (e.g. because the proposed skilled person had done a significant amount of work for the firm). The CMA may wish to identify this as a possible reason to reject a proposed provider in the Guidance (as marked in bold red).</p> <p>Similarly, the CMA might consider emphasising that – to the extent a firm is required to submit alternatives – they should do so in a timely fashion so as not to cause undue delay. There is clear potential for firms to frustrate the CMA's decision-making processes by delaying tactics e.g. in obtaining quotes, suggesting possible providers so the CMA will want to tightly proscribe the processes for this in addition to stipulating a deadline for the report.</p>
5.80	<p>As a matter of good practice, in any of the above circumstances when the duty to preserve information applies, a person should take a broad view of relevant information for these purposes and ensure preservation. For example, the CMA would expect a person to suspend routine document destruction in respect of information and documents which they know or suspect are or would be relevant. The CMA is unlikely to regard automatic destruction of relevant documents under such a programme as a 'reasonable excuse' for the purposes of any penalty that might be applicable for failure to comply with the duty to preserve</p>	<p>Epic agrees with the CMA that it is imperative that firms act responsibly when it comes to preserving relevant information. Epic suggests that the CMA may wish to strengthen this section of its Guidance accordingly to make it clear that:</p> <ul style="list-style-type: none"> <li>- The CMA expects parties to preserve all relevant electronically stored information across all forms of media (e.g. to include instant messaging systems); and</li> <li>- The CMA may decide to draw adverse inferences about a firm's conduct and degree of cooperation with the CMA's investigation if there was evidence that the firm routinely and / or intentionally destroyed documents despite being on notice that it was required</li> </ul>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	information.	to preserve relevant information (i.e. this would be taken into account in any penalty calculation).
5.83	If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for the safe-keeping of these items by the CMA pending resolution of the dispute.	Epic suggests that the CMA considers adding a caution in the Guidance that the CMA expects firms to behave responsibly when making claims for legal privilege and not to withhold relevant information by making over-expansive claims that documents are protected by privilege.
<b>Information handling</b>		
5.84	The CMA may share and use any information that it obtains for the purposes of facilitating the exercise of any of its statutory functions. Accordingly, information obtained in one context (for example, as part of a CMA market study) can be shared and used for the purposes of exercising its digital markets functions. This position is subject to the duties set out under Part 9 of the EA02, further described below.	Epic welcomes this statement in the draft Guidance. As noted above, it is critical that the CMA relies on its existing work and the information that it gathers across its different functions, in order to ensure prompt and efficient enforcement of the digital markets regime.
<b>Chapter 6 – Monitoring</b>		
<p><b>Overall summary of this section</b></p> <p>Epic welcomes the clarifications provided in this section in relation to monitoring.</p> <p>Epic considers that effective monitoring is essential to ensure that the digital markets regime is implemented in an effective way and fulfills its role of preventing harmful conduct of SMS firms. Epic believes that the involvement of third parties in the monitoring process is crucial because</p>		

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<p>it will provide the CMA with valuable insights and assistance. Furthermore, individual accountability (by way of nominated officers) for monitoring purposes, in addition to corporate accountability, is a valuable tool that will surely support compliance with requirements imposed. Epic has suggested various amendments to strengthen the Guidance in these areas.</p>		
6.4	<p>There are three key areas of monitoring:</p> <p>(a) Monitoring SMS firms' compliance with competition requirements and the appropriateness of taking further action (for example enforcement action).</p> <p>(b) Monitoring the effectiveness of existing competition requirements to determine if they are having the intended impact.</p> <p>(c) Monitoring to assess whether evidence suggests that competition could be strengthened, or harms prevented, by launching new SMS investigations or imposing new CRs or pro-competition interventions ('PCIs') and whether there is a need to vary or revoke existing competition requirements.</p>	<p>In relation to paragraph 6.4(b), Epic encourages the CMA to gather and monitor market data that would enable the CMA to assess the impact of competition requirements on the market and third parties (including, but not limited to, competitors, business users and consumers). Monitoring objective market information mitigates potential information asymmetries and will prevent designated firms from "marking their own homework".</p> <p>For instance, in order to assess the effectiveness of requirements aimed at increased choice and competition in app distribution on mobile devices, the CMA could collect data on the number of alternative app stores, number of apps downloaded through alternative distribution channels, the percentage of developers multihoming or the percentage of consumer spend outside of proprietary app stores.</p>
<p><b>Evidence gathering</b></p>		
6.10 - 6.12 6.15 - 6.19	Third party involvement in monitoring and complaints	<p>Epic welcomes the different routes for third parties to contribute to the CMA's monitoring of compliance with the digital markets regime, including through submissions or complaints to alert the CMA to examples of non-compliance. Epic is generally concerned with the level of transparency that SMS firms will provide to the CMA to demonstrate compliance with competition requirements, and as such fully supports third party involvement to assist the CMA.</p> <p>Epic expects that third party contributions will provide valuable input to assist the CMA and encourages the CMA to make use of and encourage</p>

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		these procedures. <sup>25</sup> Paragraph 6.12 of the Guidance is particularly welcome in providing details of the type of information which the CMA would find valuable and confirmation in paragraph 6.13 that submissions should be accompanied by supporting evidence in order to assist the CMA in prioritising issues for further review.
<b>Monitoring compliance</b>		
6.28 6.35	<p>6.28 A firm that is subject to certain competition requirements ('relevant competition requirements') under the regime is required to have in place a nominated officer in respect of each relevant requirement.</p> <p>(...)</p> <p>6.35 The SMS firm may appoint the same person as nominated officer in relation to multiple competition requirements. For example, an SMS firm may appoint the same person as nominated officer for all relevant competition requirements applying to a particular digital activity. It is also open to an SMS firm to appoint different nominated officers in relation to different competition requirements (for example, where a firm is subject to multiple CRs, the firm may appoint different nominated officers for each CR). <b>Where an SMS firm is subject to multiple competition requirements, the CMA may require that firm to have in place a holistic compliance strategy and / or a nominated officer with overall responsibility for the coordination of</b></p>	Epic notes the automatic assignment of any related requirements to the nominated officer to whom an initial digital markets requirement is assigned. However, it appears that different nominated officers to whom different requirements are assigned are not obliged to coordinate with each other. This may risk an unclear allocation of responsibilities, especially if there are instances of partial overlap between various relevant requirements. Epic suggests that this potential issue could be addressed by directing undertakings to put in place holistic compliance strategies that ensure coordination within an undertaking where multiple digital markets requirements have been issued or, where practicable, to have a nominated officer with overall responsibility for the coordination of an undertaking's compliance with all competition requirements imposed on it (see proposed wording in bold red).

<sup>25</sup> This was also recommended by the Digital Markets Taskforce, see Digital Markets Taskforce report, [Appendix E: The SMS regime: cross-cutting powers](#), paragraph 28.

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<b>compliance with all competition requirements.</b>	
6.46	The CMA will typically seek views from relevant stakeholders (including users of the digital activity to which the requirement relates) on the information that an SMS firm should be required to provide in compliance reports, so that the CMA can effectively monitor compliance with the competition requirement	Epic welcomes the CMA's approach to compelling SMS firms to submit compliance reports where relevant competition requirements have been imposed and notes that the substance of the compliance reports will be determined by consulting relevant stakeholders. Epic considers that it would be helpful to include in the CMA Guidance a general statement that the substance of compliance reports must contain a sufficient level of detail that demonstrates the firm's compliance with the relevant competition requirement for that requirement to be deemed fulfilled. A compliance report should not contain blanket references to previous reports or generalised statements. The contents of each report must allow the CMA to carry out a full and proper assessment of the SMS firm's compliance.
6.50 - 6.53	<p><i>Publication of compliance reports</i></p> <p>6.50 This may include a requirement for the firm to publish a copy of the compliance report or summary compliance report <b>in a readily identifiable place</b> on the SMS firm's website and make it available in hard copy at the firm's registered office.</p> <p>6.51 The CMA will typically require an SMS firm to publish a summary compliance report in relation to those relevant competition requirements to which it is subject. As well as being an important source of information for the CMA as it monitors an SMS firm's compliance with a competition requirement, compliance reports may also contain information that is of interest to third parties who may be adversely impacted by a failure of an SMS firm to comply with the relevant requirement. By requiring</p>	<p>Epic welcomes the CMA's efforts to promote transparency in relation to SMS firms' compliance with competition requirements via the publication of compliance reports. In line with this, Epic supports the CMA's intention to typically require an SMS firm to publish a summary compliance report. It is important that a copy of the report be available online and in an easy to find location on the SMS firm's website. Moreover, Epic is concerned that if SMS firms are offered the alternative of making available a hard copy of their compliance report(s) at their registered office, the purpose of transparency for and independent verification by third parties will be hampered (e.g. this may impair review by persons with mobility issues or those based outside of the UK). Epic therefore considers that SMS firms should be required to both publish their reports online and make these available in hard copy. Epic has proposed amendments to this effect as shown in bold red text.</p> <p>It is important in this context that the CMA considers lessons from other jurisdictions to ensure that compliance reports support transparency – in their public DMA compliance reports, both Google and Apple failed to</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>SMS firms to publish summary compliance reports, the CMA aims to promote transparency and assist third parties to independently verify compliance with competition requirements.</p> <p>6.52 The CMA will specify information that the SMS firm must include in the summary compliance report. The CMA will consider what is appropriate on a case-by-case basis. In making this assessment, the CMA will have regard to the likely value of information in assisting third parties to monitor an SMS firm's compliance with the competition requirement, as well as the sensitivity of the information and any adverse consequences that may result from publication of that information.</p> <p>6.53 Summary compliance reports should contain sufficient information to allow third parties to assess the extent to which an SMS firm is complying with a competition requirement, including by identifying any failures of compliance and the steps the SMS firm has taken or is planning to take to resolve the concerns.</p>	<p>effectively report on their actions or to substantiate their arguments that they are compliant with the legislation. For instance, Apple published a short, generic response. In this context, Epic calls on the CMA to ensure that the reports are detailed and informative so that third parties may scrutinise them properly.</p>
6.56	<p>In addition to statutory compliance reporting requirements, the CMA expects SMS firms to proactively notify the CMA of any issues relating to their compliance with competition requirements.</p> <p><b>The CMA will not hesitate to impose penalties on SMS firms which fail to behave responsibly in meeting any competition requirements.</b></p>	<p>Epic considers that an SMS firm's failure to notify the CMA of compliance failings would be a strong indicator of a non-participative approach with the regime which, if tolerated, risks undermining its effectiveness. As such, the CMA should give a clear steer that it will not hesitate to impose sanctions for this behaviour. Epic has proposed additional wording to be added to this section accordingly.</p>
<b>Monitoring effectiveness</b>		



Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
6.72	<p>The CMA will rely on a mix of qualitative and quantitative evidence in its assessments of effectiveness, described in general above, as well as any evidence gathered specifically to support its review of effectiveness (as per paragraph 6.10 above). The specific type of information that is most relevant for the CMA to monitor may vary by competition requirement and it may take some time for there to be a sufficient body of evidence to facilitate a meaningful review of the effectiveness of the intervention.</p>	<p>In terms of the CMA considering the effectiveness of competition requirements imposed, Epic suggests that, where available, market measuring data is used by the CMA as a benchmark for the assessment of that effectiveness.</p> <p>As noted in relation to paragraph 6.4 above, Epic encourages the CMA to consider various market data measuring the impact of competition requirements on SMS firms’ competitors and other third parties.</p> <p>Other types of metrics the CMA could use to monitor the effectiveness of competition requirements include: (i) % of active end users who have downloaded an app from the SMS firms’ app stores compared with alternative channels during the relevant period; (ii) % of active end users who started downloading through alternative channels but did not complete it; (iii) % of app developers and number of apps that use the SMS firms’ in-app payment solutions compared with third-party solutions; and (iv) % and number of active end users who have attempted to use a third-party in-app payment solution but have not completed the process. SMS firms should be required to disclose these types of metrics in their compliance reports.</p>
6.82	<p>Reasons that the CMA may decide to vary or revoke its competition requirements could be:</p> <p>(...)</p> <p>(c) new legislation or regulation is introduced that means the competition requirement in its current form is no longer appropriate;</p>	<p>Please see Epic’s comment at 4.76 above explaining that the CMA should be cautious about relying upon the introduction of new legislation or regulation to justify varying a competition requirement.</p>

**Chapter 7 – Enforcement of Conduct Requirements**

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
<p><b>Overall summary of this section</b></p> <p>Epic welcomes the enforcement tools set out in Chapter 7 and considers them to be a central part of ensuring SMS firms comply with the digital markets regime.</p> <p>Epic considers it vital that the CMA makes regular and forceful use of the Chapter 7 enforcement tools. In particular, Epic supports the involvement by third parties to assist the CMA on this front. We have included below a number of proposals that we consider would assist the CMA in making effective use of the conduct requirement enforcement tools.</p>		
<p><b>Investigations into suspected breaches of competition requirements</b></p>		
7.11	<p>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 relevant third parties to the extent that it considers it appropriate to do so.</p>	<p>Epic welcomes the CMA's confirmation that it will also engage with third parties in relation to potential breaches of competition requirements where the CMA considers it appropriate to do so. Business users of an SMS firm's digital activity / product are likely to be well-placed to identify potential breaches of the SMS firm's requirements, and the CMA should ensure that it engages with third parties where appropriate to discuss the effects of the problematic conduct.</p>
7.12	<p>In deciding whether to open an investigation into a suspected breach of a competition requirement, the information to which the CMA may have regard includes: (a) information received through its ongoing compliance monitoring (including compliance reports provided by the firm); (b) information gathered from SMS firms or other organisations using the CMA's statutory information gathering powers; and (c) information from third parties (for example complaints from users or other stakeholders).</p>	<p>Epic further welcomes the CMA's clarification in relation to the information it will consider when deciding whether to open an investigation. Information from third parties is likely to be particularly relevant in informing the CMA's decision on this front, and Epic supports the express inclusion of this as a source in paragraph 7.12(c).</p>

Paragraph number	Text in the draft Guidance and Epic’s proposed amendments in <b>bold red</b> (where relevant)	Epic’s comments
7.20	The CMA will provide the firm with an opportunity to make representations in response to provisional findings. The deadline for submitting written representations on provisional findings will be set on a case-by-case basis having regard to the individual circumstances, including the statutory deadline for the CMA to provide a notice of findings in the case of conduct investigations, and any other timing imperatives. In appropriate cases, the CMA may also seek representations on provisional findings directly from relevant third parties.	Epic considers it important that the CMA seeks representations on provisional findings from relevant third parties, where appropriate, and would therefore propose setting this out as the default position by replacing “the CMA <i>may</i> seek representations” by “the CMA <i>must</i> seek representations”.
7.26 - 7.27	7.26 Where the CMA holds documents from a third party (including a complainant) which the CMA considers to be relevant to its provisional findings and which the third party considers to be confidential, it may be necessary, prior to disclosure, to redact or withhold this information where appropriate in accordance with the relevant statutory framework. The CMA recognises that third parties can play a valuable role by drawing issues and relevant information to the CMA’s attention during an investigation and have a legitimate interest in ensuring that their confidential information is appropriately protected. The CMA will make disclosure decisions on a case-by-case basis, balancing the rights of the firm under investigation with the rights and legitimate interests of third parties and wider public interest considerations. Redacted confidential information in a provisional breach finding (including any provisional penalty notice) and any accompanying documents will be marked accordingly.	<p>Epic welcomes the protections for confidential third-party information set out in paragraph 7.26 of the draft Guidance.</p> <p>Epic considers that third party engagement and input will be of considerable importance in assisting the CMA with ensuring that the digital markets regime is upheld and enforced – third parties will be able to provide valuable input to the CMA for this purpose, but that input may well include commercially sensitive information that requires protection. Epic therefore supports the safeguard set out in paragraph 7.26 of the draft Guidance (as well as the protections listed in paragraph 7.28 of the draft Guidance which Epic considers will work well).</p> <p>As the CMA notes in paragraph 7.27, third parties may be directly affected by the outcome of an investigation. Where this is the case, it is even more important that third parties are able to engage (and are in fact engaged) in investigations. This can only be achieved if appropriate safeguards are in place as offered by paragraphs 7.26 (and 7.28) of the draft Guidance.</p>

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>7.27 The CMA also recognises that in some cases complainants and other third parties may be directly affected by the outcome of an investigation. The CMA will involve third parties in an investigation to the extent the CMA considers it appropriate in order to carry out its functions fairly, transparently, and effectively.</p> <p>7.28 The CMA will consider the most appropriate process for providing disclosure in the circumstances of each case, including the nature of the alleged breach and of the relevant documents, and the volume of gathered information. The CMA will discuss its proposed process with the firm under investigation at an appropriate stage of the investigation. In all cases, the CMA will seek to ensure that the process is as efficient as practicable, having regard to applicable statutory deadlines for conducting investigations, as well as any need for the CMA to act on an urgent basis or other timing imperatives, while ensuring that the firm under investigation is able to exercise its rights effectively. For example, the CMA may consider one or more of the following options as appropriate:</p> <p>(a) Where the information gathered is not voluminous and has been provided predominantly by the firm under investigation, it may be practicable to provide the firm with the gist of the relevant information in a provisional breach finding and copies of any additional documents supplied by third parties</p>	

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>subject to the CMA's confidentiality assessment as referred to in paragraph 7.26 above.</p> <p>(b) In other cases where the volume of information is considerable and includes a substantial number of documents supplied by third parties, subject to the CMA's confidentiality assessment as referred to in paragraph 7.26 above, the CMA may provide the firm under investigation with one or more of the following: (i) the gist of the relevant information and / or copies of the documents directly referred to in the provisional breach finding; (ii) a list of other documents the CMA considers relevant, with the firm being able to make reasoned requests for access to specific listed documents. The CMA will set a reasonable and proportionate time period within which the firm will be able to make any such requests, taking into account the volume and nature of the information as well as applicable statutory deadlines, any need for the CMA to act on an urgent basis, and / or any other timing imperatives.</p> <p>(c) The CMA may also rely upon a confidentiality ring or data room to facilitate the provision of third party information, allowing the firm's external advisers to carry out an assessment of the documents. (...)</p>	
<b>Enforcement of conduct requirements</b>		

Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
7.41	IEOs are orders imposed on an interim basis in conduct investigations in relation to a suspected breach of a CR. <b>IEOs may involve positive or negative obligations (ie requiring a firm to do or not do certain things).</b>	Epic notes that the draft Guidance specifically confirms in paragraph 7.93 that EOs can be framed as positive or negative obligations. On the assumption that the same applies to the content of IEOs, Epic suggests that, for the sake of consistency, equivalent wording is inserted into the draft Guidance in relation to IEOs, either in paragraph 7.41 (marked in bold red) or as a standalone paragraph under the <i>Overview</i> section for IEOs.
7.44(b)	<p>In particular, in considering whether the statutory criteria for imposing an IEO are met, the CMA will typically consider the following:</p> <p>(a) <b>Reducing the effectiveness of CMA actions:</b>  Conduct which could reduce the effectiveness of other steps the CMA might take may involve conduct that is prejudicing or impeding, or is likely to prejudice or impede, the imposition of any EO that the CMA might impose. This may involve, for example, imposing an IEO to require a firm to not make changes to its systems which would be very difficult to reverse if the CMA required this at the end of its investigation.</p>	Epic notes the matters the CMA will be taking into account when considering the statutory criteria for imposing an IEO as listed in paragraph 7.44(a) to (c). Epic considers that paragraph 7.44(b) is of particular importance, and that, in practice, the CMA's ability to <i>"require a firm to not make changes to its systems which would be very difficult to reverse"</i> will be highly relevant in the context of assessing IEOs.
7.45	Before imposing an IEO, the CMA must give the firm to which it would relate an opportunity to make representations about the IEO it proposes to impose, unless the CMA considers that doing so would substantially reduce the effectiveness of the order. The CMA may decide not to provide this opportunity where it considers that doing so would risk undermining its ability to impose the order or ensure compliance with it, or would otherwise risk	Epic considers the CMA's power to impose IEOs without the firm in question having the opportunity to make representations as essential for IEOs to achieve their purpose. It is of the utmost importance that the CMA can act quickly in circumstances where a breach of conduct requirement is suspected and, in particular, where that suspected breach is causing significant damage. The purpose of and protections afforded by IEOs would be defeated if, in the circumstances described, firms were able to slow down the process of IEOs being put in place by making representations.

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	rendering the order ineffective, for example by enabling a firm to take steps to frustrate the effective implementation of an IEO before it can be imposed.	
7.62	When formulating and imposing a CR, the CMA would expect to take into account loss, if the given CR were imposed, of any benefits to users or potential users that may be generated by conduct which the CR is directed at. As such, where a firm seeks later to rely on the CBE in a conduct investigation, and benefits of conduct have already been taken into account by the CMA, the CMA will expect the firm to provide new evidence going beyond any previous submissions or representations it has made on the relevant matters.	Epic welcomes the caveats set out in this section in connection with a firm's ability to rely on a CBE in a breach of conduct investigation. It is of significant importance that firms are transparent at the outset in relation to the benefits of relevant conduct, so that there is no room for strategically holding back and deploying at a later stage any arguments around further benefits in an attempt to invoke the CBE.
7.65	<p><i>Condition 1: Benefits to users or potential users (...)</i></p> <p>To satisfy this condition, the firm should provide the CMA with evidence of benefits arising from the conduct to a substantial number, or significant category, of users or potential users of the digital activity. The appropriate evidence will vary depending on the circumstances of each case. Where appropriate it might include, for example, a report by an independent expert verifying the existence and / or extent of the claimed benefits. The CMA will consider the scope and impact of claimed benefits in considering whether this condition is met. Where benefits have not yet been</p>	Epic notes the CBE, i.e. the countervailing benefits exemption, and its conditions. In relation to the first criteria (i.e. the requirement that the conduct under investigation must give rise to benefits to users or potential users of the digital activity in question), Epic considers it important that the evidence the firm provides is verified by an independent expert. To ensure that this condition is properly satisfied, the engagement of an independent expert should be the rule not the exception and, ideally, should apply to all cases.

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	realised, the CMA will expect them to be sufficiently timely and likely to do so.	
7.68	<p><i>Condition 3: Benefits could not be realised without the conduct</i></p> <p>The third condition of the CBE criteria requires that the benefits could not be realised without the conduct. This condition imposes a standard that is akin to the 'indispensability' test in section 9(1)(b) of the CA98. Therefore, the CMA will have regard to the interpretation of that test when applying condition 3.</p>	Epic welcomes the fact that the draft Guidance specifically refers to the 'indispensability' test and underlines that benefits could not be realised without the conduct. Effective enforcement requires that the CBE remains robust.
7.70	Where there is a reasonable or practical alternative to the conduct in question, the firm should explain why this could not give rise to the benefits with less anti-competitive effect.	Epic notes the option for firms to explain why reasonable or practical alternatives to the conduct in question could not give rise to the benefits with less anti-competitive conduct. Epic suggests that the CMA might invite third party views in determining whether there are any " <i>reasonable or practical alternatives</i> " to the conduct in question and whether those alternatives could give rise to the benefits.
7.74 - 7.76	<p>7.74 Under the Act, the CMA may accept an appropriate commitment from an SMS firm subject to a conduct investigation as to its behaviour in respect of a CR to which the investigation relates. The CMA will have discretion to determine which cases are suitable for commitments and the circumstances in which an appropriate commitment will be accepted.</p> <p>7.75 The ability to accept an appropriate commitment in relation to a conduct investigation will provide the CMA with the flexibility, where it considers it appropriate, to conclude a conduct</p>	Epic is concerned that the ability of firms under investigation to offer commitments and thereby avoid a notice of findings being issued against them will be misused, unless, in practice, the scope for such commitments to be made and accepted is limited to exceptional circumstances.



Paragraph number	Text in the draft Guidance and Epic's proposed amendments in <b>bold red</b> (where relevant)	Epic's comments
	<p>investigation (without issuing a notice of findings)<sup>459</sup> or change the scope of a conduct investigation (where a commitment is offered in relation to some, but not all of the behaviour which is subject to investigation).</p> <p>7.76 Where the CMA has concerns about an SMS firm's compliance with a CR, it may engage with the SMS firm in order to understand whether participative resolution of the concerns is possible (see Chapter 6 on Monitoring). Given this, and the short statutory time period for conduct investigations, the CMA's acceptance of a commitment once a conduct investigation has been launched will likely be rare in practice.</p>	
7.79	<p>The need for confidence reflects the fact that, following acceptance of a commitment, the CMA is prevented from issuing a notice of findings in relation to the behaviour which is the subject of the proposed commitment and would therefore close (or narrow) its conduct investigation potentially before all evidence has been gathered and assessed.</p>	<p>As with paragraphs 4.86 and 4.95, Epic agrees with the CMA's proposed approach, particularly its emphasis on the fact that it will need to be confident that the proposed commitment will be clearly effective.</p>
7.89	<p>7.89 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 where it has reasonable grounds: (...)</p> <p><b>7.91. In practice, the CMA may be able to complete such conduct investigation at a</b></p>	<p>Epic considers that, in such circumstances, the CMA may be able to conduct the investigation at a faster pace than usual given the information that it will have available as a result of the commitments process and the ongoing duty to keep under consideration whether or not the commitments remain appropriate. Epic encourages the CMA to state this in the Guidance and has added some proposed wording to this effect, to mirror the provision at paragraph 2.97 (in bold red text).</p>

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	<b>faster pace due to the information it will already have available.</b>	
7.101	The CMA will be more likely to grant consent if requests by the firm are fully specified, reasoned and supported by relevant evidence. The CMA <b>will typically</b> publish granted consents in appropriate cases, such as where it wishes to provide clarity to impacted third parties as to why a firm is acting in a way that would otherwise be contrary to its EO obligations.	<p>Epic appreciates that the CMA has discretion to consent to conduct that would otherwise be a breach of an EO under s.31(8) of the Act and that the CMA wishes to grant itself broad discretion as to when it publishes the granted consents. However, having certainty and clarity as to the extent of an SMS firm's obligations will be key to third party business users being able to assess whether the SMS firm is complying with its obligations. Epic therefore proposes a small amendment in bold red to the wording in this section to indicate that the CMA will generally, where possible, publish granted consents (see proposals in bold red text).</p> <p>Epic notes that it will likely be in the CMA's interests to ensure that consents are published, as it may otherwise receive third party complaints in relation to conduct that it has already approved, which would create needless paperwork for the CMA to review.</p>
<b>Chapter 8 – Penalties for Failure to Comply</b>		
<p><b>Overall summary of this section</b></p> <p>Epic welcomes the CMA's ability to impose penalties for failure to comply with the digital markets regime and suggests that, in order for those penalties to act as an effective deterrent, they are used broadly and consistently, and offending undertakings are not given opportunities to avoid or unnecessarily delay the imposition of penalties.</p>		
<p><b>The role of penalties and the CMA's approach</b></p>		
8.8 - 8.10	8.8 It is essential that all firms subject to the digital markets competition regime take their responsibilities seriously and comply fully with the requirements placed on them. The CMA's powers	Epic welcomes the CMA's emphasis on the importance of compliance with the digital markets regime and, in particular, the CMA's confirmation that it will not hesitate to impose substantial penalties for non-compliance (paragraph 8.9). The success of the regime in securing that

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	<p>to impose penalties play a critical role in ensuring this and avoiding harm to competition and consumers from non-compliance.</p> <p>8.9 The CMA will therefore not hesitate to impose substantial penalties – both 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.</p> <p>8.10 The CMA will not, however, apply a mechanistic or one-size-fits all approach. When assessing whether to impose a penalty, what type and in what amount, the CMA will take into account all relevant circumstances in each case.</p>	<p>digital markets stay open, fair and competitive may in large part be driven by how 'tough' the CMA is perceived to be as a regulator.</p>
8.12	<p>These factors are non-exhaustive – the CMA may consider it appropriate to impose a penalty because of other factors.</p>	<p>Epic welcomes the CMA's confirmation that the factors listed at para 8.11 are non-exhaustive and considers that the broad discretion which the CMA has reserved itself in this regard is consistent with ensuring the effectiveness of the penalty regime provided for in the Act.</p>
8.33	<p>An important part of deterrence is that an undertaking should not be able to profit from failing to comply, even after having paid any penalty imposed (i.e. disgorgement). Effective deterrence requires that a penalty imposed materially exceeds rather than simply neutralises any likely or potential gains from a failure to comply such that there is a strong economic incentive to comply. In this context, in addition to the specific area related to the failure, gains may include those which may accrue to the undertaking in areas or activities</p>	<p>Epic welcomes the draft CMA Guidance confirming that an important part of deterrence must be that an undertaking is not allowed to make any profit from failing to comply with requirements imposed on it. In this context, Epic considers that it is essential to take into account possible gains in areas or activities beyond those directly associated with the failure, as indicated in the draft Guidance. This is because the ecosystems of firms likely to meet the SMS designation threshold are made up of highly complex and interconnected areas and activities that are very likely to allow losses in one to be compensated by gains in another.</p>

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	beyond those associated with the failure.	
8.37	The CMA may consider evidence of the following non-exhaustive list of factors as aggravating: (...) (f) repeated failures by the same undertaking or other undertakings in the same group (ie recidivism) <b>which may concern conduct in relation to this investigation or another investigation under the Act.</b>	Epic suggests adding clarifying wording to paragraph 8.37(f) to confirm that recidivism covers repeated failures by the same undertaking both in relation to the investigation for which a penalty is being imposed, as well as any other investigations under the Act (see the proposed additions in bold red text).
8.43(c); Fn 557	8.43(c) Section 114 EA02 sets out a party's rights of appeal to the CAT in relation to the imposition or nature of a penalty, the amount or amounts of the penalty, or the date/s by which the penalty or (as the case may be) the different dates by which different portions of the penalty are required to be paid. <sup>557</sup>  <sup>557</sup> The decision to impose a penalty and the nature and amount of such penalty is separate from the preceding decision that there has been a breach of a competition requirement, and from which the power to impose a penalty derives. Different appeal rights apply in respect of that finding of breach (see section 103 of the Act).	To ensure the DMCC appeals regime achieves its intended purpose, Epic considers it vital that (i) the grounds for which a CMA penalty decision can be appealed are interpreted narrowly and (ii) the limited grounds for an appeal on the judicial review standards under section 103 are applied strictly, to prevent the risk of undertakings erroneously seeking to expand appeal points to include issues which concern the merits of the decision.
<b>Chapter 9 – Administration</b>		
<p><b>Overall summary of this section</b></p> <p>Epic welcomes the CMA's clear statements regarding the administrative processes it will follow when carrying out its digital markets functions</p>		

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<p>across the regime. In our view, transparency is of utmost importance here, in particular because that will ensure the ability of third parties to effectively and regularly become involved in the process (where appropriate) and assist the CMA.</p>		
<p><b>Consultation and publication of statements</b></p>		
9.11	<p>Any consultation that the CMA carries out in respect of its digital markets functions must include the reasons for the finding, decision or proposal to which the consultation relates, and such other information as the CMA considers necessary to allow a proper understanding of those reasons.</p>	<p>Epic welcomes this clarification and encourages the CMA to interpret "<i>such other information as the CMA considers necessary to allow a proper understanding of those reasons</i>" broadly, in order to ensure that third parties can engage effectively and provide meaningful and considered responses.</p>
9.14	<p>Typically, the CMA will invite written responses to its consultations. It may also use a range of other methods including conducting one-to-one telephone calls, video conferences, surveys or hosting in-person meetings to receive views and comments.</p>	<p>Epic welcomes the CMA's commitment in the draft Guidance to allowing for flexibility in its mode of consultation as this will ensure that comments can be fed into the CMA in a timely manner and allow free-flowing discussion to ensure all comments are properly understood. Notes of calls can be agreed and follow-up written materials provided to ensure the CMA has a robust evidence base to inform its decision-making.</p>
<p><b>Transparency</b></p>		
9.18	<p>Transparency includes ensuring the parties directly involved and other interested persons (if appropriate) are informed during the course of an investigation of key developments.</p>	<p>Epic welcomes the CMA's commitment to transparency and the confirmation that the CMA will also look to ensure that other interested persons are informed about key developments. This will be important given the potential significant impact that the imposition of CRs and PCIs on SMS firms will have on relevant digital activities as, in the case of other market participants, there will be a need to plan their business activities so as to take advantage of the opportunity to compete effectively once available.</p>

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		<p>In addition, third parties will have significant contributions to make on the likely effectiveness of proposed CRs and PCIs based on their experiences of attempting to compete with or consuming relevant services or products.</p> <p>Moreover, where the CMA intends to trial remedies and iterate a PCI, third parties will want to engage fully in this process so as to assist the CMA in ensuring its effectiveness and identifying potential compliance gaps which could be exploited by SMS firms.</p>
9.22	<p>9.22 The steps outlined above are the minimum steps the CMA will take to ensure transparency. The CMA will seek to operate the regime in a transparent and participative manner, engaging with a wide range of stakeholders as part of its invitation to comment or consultation processes, in order to inform its decision-making. This is likely to involve other transparency mechanisms as the regime develops.</p>	<p>Epic is fully supportive of the CMA's commitment to operate the new regime in a transparent and a participative manner. Epic considers that the success of the regime will be dependent on designing effective intervention measures that curtail harmful behaviour by SMS firms and ensure digital markets stay open, fair and competitive. Given the information asymmetry the CMA faces in regulating SMS firms, third parties will have a significant role to play in ensuring the CMA has relevant information to inform its decision-making.</p>
<b>Duty of expedition</b>		
9.23	<p>The CMA will have regard to its duty of expedition in carrying out its digital markets competition functions and the need to make decisions, or otherwise take action, as soon as reasonably practicable. Accordingly, there will be circumstances where the CMA progresses its investigations more quickly than general guidance on timelines or statutory deadlines may indicate.</p>	<p>Epic supports the CMA's commitment to satisfying its duty of expedition and considers that transparency has a key role to play in ensuring that the CMA can discharge this duty effectively. By consulting widely (albeit within sensibly prescribed timescales) the CMA can ensure that it has all relevant information to enable it to confidently reach robust decisions that are well-supported by evidence.</p>
9.25	<p>Where parties or their advisors act in a manner which runs counter to this requirement, for example seeking to delay the process by making late,</p>	<p>Epic notes the concerns identified by the CMA about parties seeking to disrupt the CMA's decision-making process through delaying tactics. Epic suggests that the CMA may wish to impose page limits on</p>

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	<p>duplicative or unnecessarily lengthy submissions, the CMA may be less able to engage as fully with such submissions, particularly where they risk undermining the effective exercise of the CMA's functions.</p>	<p>responses in order to encourage efficiency and that the CMA should not hesitate to use its power to impose administrative penalties to hold parties to account.</p>