

Response to the CMA's consultation on the digital markets competition regime guidance and guidance on the merger reporting requirements for firms with strategic market status

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1. **Introduction**

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation on its draft guidance on the CMA's functions under the digital markets competition regime (the "**regime**") established by Part 1 of the Digital Markets, Competition and Consumers Act 2024 (the "**DMCC Act**"). The draft guidance is made up of: (i) the digital markets competition regime guidance; and (ii) the guidance on the merger reporting requirement for firms with strategic market status (together the "**Guidance**").
- 1.2 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients.
- 1.3 Our response reflects our experience in advising clients in the digital sector, on competition matters before the CMA and other competition regulators globally, as well as on other similar ex-ante regulatory and digital regimes in the UK and in other jurisdictions.
- 1.4 We confirm this response does not contain any confidential information and we are happy for it to be published on the CMA's website to the extent necessary.

2. **Executive summary**

- 2.1 We have been grateful for the opportunity to discuss some of the novel issues arising from the DMCC Act in the various meetings we have had with the CMA, and in the roundtable sessions hosted by the CMA.
- 2.2 The DMCC Act provides for a novel approach to competition regulation in the UK, and gives the CMA extensive powers, including new powers to, for example, require firms designated with strategic market status ("**SMS**") to vary their usual conduct. The new regime is likely to have substantial consequences for SMS-designated firms and for other participants in these markets, their customers, end-users and the wider UK economy. It is important that the Guidance provides all stakeholders with a clear understanding of the purpose of the regime and how the CMA will implement it. The Guidance should also provide an explicit framework of the proposed aims of the regime.
- 2.3 We consider that there is an opportunity for the Guidance to be developed further, to ensure that it offers businesses clarity on how the CMA will, for example, ensure that its core objectives are delivered, and how it will apply its discretion (where applicable) under the DMCC Act in a proportionate and targeted manner.
- 2.4 We note that the Guidance is at times limited in providing additional commentary, further explanation of key issues, or worked examples to help stakeholders understand how the CMA will exercise its powers under the DMCC Act. From our experience advising clients in relation to other areas for which the CMA provides guidance (including Horizontals, Verticals and Merger Control, and other similar ex-ante regulatory and digital regimes) the inclusion of practical worked examples linked to commentary on specific aspects of a regulator's powers is highly valuable for businesses in aiding their understanding of and ensuring compliance with the relevant regime and legislation. Inclusion of a similar level of detail and more examples in the Guidance will enable businesses to cooperate with the CMA, as required, to ensure that the regime operates effectively and efficiently, and produces the intended aims and outcomes.

2.5 We understand that the CMA is keen to adopt a flexible approach in relation to the regime, particularly in its early stages, and that the CMA intends for its approach to evolve as the regime comes into place. We agree that the CMA should adapt to and learn from the regime as it develops. However, we consider a balance is required between flexibility and ensuring that the Guidance offers greater clarity and legal certainty for businesses and other stakeholders. It is particularly important for businesses to understand how the CMA intends to interpret and apply the DMCC Act in practical terms. From our experience as legal practitioners, businesses benefit hugely from having access to practical guidance, and this would not preclude the CMA from updating or amending future guidance to account for learnt experience as the regime progresses.

2.6 The remainder of our response sets out our overarching comments on the Guidance and some high level comments on specific parts of the Guidance.

3. **Overarching comments**

3.1 We have a number of overarching comments on the Guidance which are set out below.

3.2 In order to assist stakeholders, we consider that the Guidance should use more decisive language and include more illustrative examples. Much of the language used throughout the Guidance is non-committal and open, which from our experience can lead to confusion and uncertainty for businesses and practitioners alike. For example, the CMA often states in the Guidance that it is "*likely to*" or "*may*" (rather than "*will*") consider certain factors before exercising a power.

3.3 Whilst there are instances of the Guidance detailing the types of evidence that the CMA expects stakeholders to provide and the factors it will take into account when assessing that evidence, some chapters would benefit from more of this type of guidance which has proven to be invaluable in the CMA's guidance relating to other competition law regimes, such as mergers and markets. By way of example, whilst we acknowledge that the types of evidence required to conduct an SMS assessment will likely vary on a case-by-case basis, it would be beneficial if the Guidance contained some examples of the types of evidence that might be considered (e.g., win/loss data, customer switching, entry and expansion, proof of multi-homing etc.). We consider that the more guidance the CMA can provide in relation to evidence, the more effective the regime will be, as stakeholders will be able to allocate resources to the evidence sources most likely to assist the CMA.

3.4 The DMCC Act provides the CMA with a broad discretion in many respects, and we consider that the Guidance would benefit from providing a clearer framework for how the CMA will carry out its substantive analyses. In particular, the CMA could draw upon its considerable experience and learnings from operating other competition regimes, and where appropriate, make use of the well-established analytical techniques that it has developed in the context of the same. By way of example, a market definition exercise (or at least some aspects of the same) could be helpful to the CMA when conducting pro-competitive intervention ("**PCI**") investigations. Whilst we acknowledge that this is a novel regime, and that it will not always be appropriate to import concepts in a wholesale manner from other regimes, we consider that previous learnings will still be valuable in ensuring that the regime is developed from a solid foundation. In addition, this will help to provide greater transparency and legal certainty for businesses and other stakeholders, and consistency in the CMA's approach.

3.5 As well as providing more structure around the CMA's substantive assessments, the Guidance would benefit from a clear and thorough procedural framework for

each key stage of the regime. At present, the Guidance does not provide indicative procedural timetables for the following key processes: SMS designation, the imposition of conduct requirements ("CR"), PCI investigations, and investigations into suspected breaches of CRs and other competition requirements. Supplementing the Guidance with indicative timetables for these processes will ensure procedural fairness for all stakeholders, including firms who may be designated as having SMS as well as third parties who need to understand when and how they can input into the CMA's investigations under the new regime. It will also enable the CMA to effectively manage what may in some cases be challenging statutory deadlines.

- 3.6 As part of these processes, it will be important for the Guidance to provide interested parties with sufficient opportunities for meaningful engagement with the CMA, as is the case with the merger and markets regimes. Allowing for such engagement will enable the CMA to most efficiently obtain the input that it needs in order to carry out its functions under the regime. It will also ensure that SMS firms and other relevant parties are able to exercise their rights effectively. There are already a number of instances of the Guidance providing SMS firms and other relevant parties with engagement opportunities, but in some cases these would benefit from further enhancement. By way of example, paragraph 7.21 of the Guidance affords the CMA with a discretion as to whether or not an SMS firm is given the opportunity to make oral representations in response to the CMA's provisional findings in the context of investigations into suspected breaches of CRs and other competition requirements. We consider that providing this opportunity in all but exceptional circumstances would benefit the CMA as an oral hearing provides an efficient way of receiving a firm's representations on the provisional findings, and it would also ensure that the CMA is appropriately respecting SMS firms' rights of defence.
- 3.7 We understand that the CMA is considering how to provide further guidance on the procedures and rights that apply to third parties, in light of the approach to similar issues under other regimes. We welcome further clarity on this point.

4. **Comments on specific aspects of the Guidance**

- 4.1 We have the following comments on specific aspects of the Guidance.

(a) Strategic Market Status

- 4.2 The Guidance would benefit from further detail on how the CMA will interpret the concept of "*substantial and entrenched market power*". Whilst paragraph 2.45 provides that market power is a distinct legal concept from that of dominance, it would be helpful to understand in what way the concepts are different, and whether the threshold for substantial and entrenched market power is intended to be higher or lower than that for dominance. In addition, paragraph 2.42 of the Guidance suggests that market power will be "*entrenched*" where it is not transient. This appears to be a low threshold, and further guidance on how this will be interpreted by the CMA, including the types of evidence that will be taken into consideration, would be welcomed.

(b) Conduct requirements

- 4.3 The Guidance would benefit from providing further clarity on the circumstances in which the CMA will impose CRs on an SMS firm's conduct in a non-designated activity. This has the potential to be a broad power, and further detail in this regard is important in ensuring that it is exercised in a proportionate manner, and to generate certainty for SMS firms and other relevant parties. This could include

illustrative examples of when and why it might be appropriate for the CMA to intervene in this way.

- 4.4 We would also welcome more guidance on the CMA's ability to vary CRs and we understand that the CMA is considering this further.

(c) Pro-competition interventions

- 4.5 We would welcome more clarity in the Guidance on the overlap between CRs and PCIs, and in particular, on the scenarios where the CMA will choose to apply CRs rather than a PCI (and vice-versa). Such clarification is important to ensure that relevant stakeholders understand the regime, how it applies and what is required of them.

(d) Investigatory powers

- 4.6 We consider that the Guidance would benefit from providing further detail on the safeguards which will apply in respect of the CMA's information gathering powers, which have the potential to be broad. This would assist the CMA in ensuring that these powers are used proportionally, and to avoid imposing unnecessary burdens on those who are subject to requests.

(e) Merger reporting requirements for SMS firms

- 4.7 As with other parts of the DMCC Act, the mergers reporting requirement for SMS firms is a far-reaching power and introduces an entirely new mandatory element to UK merger control. We welcome the approach outlined by the CMA which indicates similarities with the CMA's successful briefing paper process and we support this type of approach. Given the breadth of this power, we agree with the CMA on the importance of clarifying the "UK nexus" test for which there is more limited guidance currently, and look forward to the consultation referred to in the Guidance. This will provide transparency for all parties including SMS firms and other transaction parties.

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