THE CMA'S CONSULTATION ON THE DRAFT DIGITAL MARKETS COMPETITION REGIME GUIDANCE

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP

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RESPONSE TO THE CMA'S CONSULTATION ON THE DRAFT DIGITAL MARKETS COMPETITION REGIME GUIDANCE

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (the ***Firm***) welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on the draft digital markets competition guidance (the ***Guidance***), including the draft digital markets competition regime guidance (***DMCR Guidance***) and the draft guidance on the mergers reporting requirements for SMS (as defined below) firms (***MRR Guidance***).

1.2 This response is based on our significant experience and expertise in advising clients in matters conducted by the CMA, together with our significant experience with similar matters in other jurisdictions, including in relation to the Digital Markets Act (***DMA***).[1]

1.3 The Guidance sets out how the CMA will approach its functions and exercise its new and expanded powers under Part 1 of the Digital Markets, Competition and Consumers Act 2024 (***DMCC Act***, or the ***Act***). In this respect, the draft Guidance provides important clarifications on how the CMA will administer the digital markets regime in relation to both firms designated as having "strategic market status" (***SMS***) and third parties.

1.4 However, as explained in detail below, the draft Guidance also suffers from certain significant shortcomings. These shortcomings, which are capable of being readily addressed by the CMA in finalising the Guidance, are inconsistent with the over-arching purposes of the digital markets regime provided for by the Act, and risk disincentivising investment and innovation (and worsening the experience of UK businesses and consumers) by creating unnecessary uncertainty and imposing undue burdens on the firms that are designated. These key shortcomings are:

(a) the absence of meaningful guidance on key elements of the regime;

(b) the absence of any meaningful explanation of the processes that will be followed in taking certain key decisions;

(c) aspects of the draft Guidance which are *ultra vires* and/or unduly prescriptive;

(d) the absence of "bright line" merger control rules in a regime in which the failure to "file" can (for the first time in UK merger control) result in significant fines; and

(e) the potential mischaracterisation of the CMA's duty of expedition.

1.5 Reflective of these themes, we also propose in the **Annex** to this response a number of suggestions for expansion, clarification, or revision of the draft Guidance.

1.6 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

[1] Digital Markets Act Regulation 2022 (EU) 2022/1925.

2. General observations

2.1 The DMCC Act confers significant powers on the CMA and introduces considerable procedural flexibility to enable the CMA to administer the new digital markets regime effectively and, where necessary, impose competition requirements on designated firms quickly. While the regime has the potential to deliver material benefits to businesses and consumers in the UK, there are risks associated with the flexibility and speed with which the CMA is able to deploy the regime – including the prospect of unpredictable, incorrect or inconsistent decisions that may distort competition and deter the innovation the regime is seeking to foster.

2.2 The CMA has supported the introduction of a digital markets regime in which its decisions are subject to appeal only on a judicial review standard and therefore sought to limit the extent of judicial oversight over how it exercises its powers, citing, in part, the strength of the due process rights that would be built into CMA proceedings.[2] It is therefore imperative that the CMA should deliver on this promise and ensure that the Guidance provides adequate procedural protections so that the digital markets regime can be (and is seen to be) enforced fairly and transparently. This includes providing a sufficient degree of certainty and predictability as to how the CMA will exercise its discretion, as well as ensuring that parties are provided appropriate opportunities to be heard at various stages of proceedings.

3. Absence of meaningful guidance on key elements of the regime

3.1 We recognise one of the intentions of the Act is to afford the CMA flexibility in defining the parameters of the digital markets regime to ensure the Act remains fit-for-purpose as fast-moving digital markets evolve over time. However, such flexibility must be balanced with the need to provide important clarity on how the CMA will ensure effective administration of the regime in a way that achieves the intended benefits. The CMA itself has recognised the importance of the Guidance in holding it to account in the operation of the regime.[3]

3.2 Considering the novelty of the regime, the Guidance currently falls short of providing sufficient detail about how the CMA will implement and enforce the regime.

3.3 While we recognise that the CMA will not want to limit voluntarily the powers conferred to it by the Act, we would encourage the CMA to use the Guidance as an opportunity to ensure adequate legal certainty by clarifying the scope and application of certain key provisions within the Act. This is particularly the case in circumstances where the CMA, in light of the work that it has undertaken to prepare for the entry into force of the regime, is likely to have at least some indicative thinking to share about its intended approach. As the CMA has the discretion to depart from the Guidance where appropriate circumstances arise,[4] the CMA should not shy away from providing further detail on how it intends to – or how it intends not to – administer the digital markets regime in the ordinary course.

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2 Overview of the CMA's provisional approach to implement the new Digital Markets competition regime, 11 January 2024, section 6; Written evidence by the CMA to the Public Bill Committee for the Digital Markets, Competition and Consumers, June 2023.

3 Overview of the CMA's provisional approach to implement the new Digital Markets competition regime, 11 January 2024, section 6.

4 DMCR Guidance, para. 1.7.

3.4 We consider that it is particularly important to revisit and clarify the following areas:

(a) "Digital activities": as recognised by the DMCR Guidance, the concept of a digital activity "*sets the scope for designation*" where the approach adopted by the CMA will significantly impact the design and application of conduct requirements (***CRs***) and pro-competition interventions (***PCIs***).[5] While the CMA does not want to impose the rigidity of a DMA-like regime, the CMA should provide additional guidance on how it will approach the identification of "digital activities" and group together "digital activities" into a single digital activity. After noting the CMA will interpret the relevant conditions "broadly", the draft Guidance merely notes that the CMA will look at "any relevant aspect" of how the products are made, marketed, sold, accessed, or consumed (effectively providing no tangible guidance).[6] This is a critical point in the operation of the regime as the DMA's "gatekeeper" and "core platform service" designation process has demonstrated that the boundaries of activities undertaken by digital firms is not always clear-cut.

(b) Final offer mechanism (***FOM***): clarity on the use of the FOM is particularly important given this will be the first time the CMA will have the opportunity to determine pricing in a competition context, including: (i) how the CMA will balance the FOM with an SMS firm's freedom of contract; (ii) identifying the factors on which the CMA will rely when assessing final offer payment terms; and (iii) clarifying when FOMs may be used rather than alternative measures available to the CMA under the Act.

(c) Penalties: the DMCR Guidance is not sufficiently clear in relation to the imposition of penalties. The Act provides the CMA with powers to impose significant turnover-based fines on businesses in a new regulatory regime which may involve novel questions of compliance and potential harm. It is therefore crucial that the DMCR Guidance sets out as clearly as possible how the CMA intends to use its fining powers under the Act, including in relation to: (i) the type of penalty imposed; and (ii) the various factors relevant to penalty calculation.

4. Absence of meaningful explanation of processes to be followed for key decisions

4.1 The absence of information in the Guidance regarding the procedure for key decisions poses a significant risk to due process and procedural fairness. Additional guidance on procedure is important in order to support the proper functioning and administration of the new regime. This would help to ensure that the regime is applied consistently and effectively, thereby minimising the potential for future challenge, as well as enhancing stakeholder confidence in the regime.

4.2 The DMCR Guidance should therefore provide more clarity on the processes around the application and enforcement of CRs and PCIs. In particular:

(a) Design and application of CRs: to ensure CRs are in fact pro-competitive and do not unnecessarily stifle innovation and negatively impact consumers, the DMCR

[5] DMCR Guidance, para. 2.4.
[6] DMCR Guidance, para. 2.14.

Guidance should provide SMS firms and third parties with a clearer framework in order to ensure effective compliance. This should include additional details regarding: (i) how the CMA will protect the procedural rights of parties while carrying out an SMS investigation alongside a CR consultation; (ii) how the CMA will determine when to use its PCI powers as opposed to seeking to impose CRs; and (iii) in what circumstances the CMA will seek to impose CRs on non-designated activities.

(b) Varying CRs: the DMCR Guidance should clarify the interplay between the formal process for varying CRs (as set out in the Act) and the processes of supplementing CRs or issuing (and updating) interpretative notes (as set out in the Guidance but not expressly envisaged in the Act). In particular, the DMCR Guidance currently suggests the CMA may use either route in similar circumstances,[7] making it all the more important that interpretative notes are subject to proper procedural safeguards and do not result in an unpredictable and frequently shifting compliance framework that is unduly burdensome for SMS firms and detrimental to the experience for UK consumers and businesses.

(c) Design of PCIs: similarly, to ensure that PCIs are deployed effectively, the DMCR Guidance should articulate with greater precision how the CMA will design PCIs, clarifying, for example, that the CMA will consider proportionality throughout the process, rather than this being a final check at the end of the design process.

(d) Investigations into suspected breaches of competition requirements and the enforcement of CRs: the DMCR Guidance would benefit from additional clarity around key aspects of the enforcement process that the CMA intends to follow, including: (i) the process relating to conduct investigations, in particular details around how the CMA will communicate its initial thinking and provide regular updates to SMS firms (such as via State of Play meetings); and (ii) how representations from SMS firms and third parties will be considered by the CMA. Clarity in these areas would be consistent with existing CMA guidance, including the CMA's guidance on market investigations and Competition Act 1998 (***CA98***) investigations and would ultimately ensure effective administration of the digital markets regime.[8]

5. Aspects of the guidance that are *ultra vires* and/or unduly prescriptive

5.1 Certain sections of the Guidance appear to be either *ultra vires* or excessively prescriptive, going beyond the scope and requirements of the Act. There is no clear policy justification for doing so, given the extensive powers and potential requirements already provided by the Act. The CMA should therefore reconsider its approach in this regard in order to ensure: (a) the Guidance aligns with the spirit and wording of the Act, including the "future-proofing" aims; and (b) firms have sufficient flexibility to

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[7] For example, the DMCR Guidance notes that the CMA may vary a CR in response to "*changes in the market (including changes in technology) or other changes in circumstances in circumstances which mean the competition requirement is no longer appropriate to achieve the intended aim*", while similarly noting that the CMA may update interpretative notes to reflect "*changes in circumstances, including changes to technology*". See: DMCR Guidance, para. 6.82(a) and para. 3.56.

[8] Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8 (***CMA8***), para. 9.8 *et seq*.

comply with the Act in a way that is most effective based on their own internal structures, without imposing unnecessary burdens.

5.2 To address these issues, we suggest that, where relevant, the CMA either removes such references or aligns the Guidance more closely with the wording and aims of the Act. In particular:

(a) "Substantial and entrenched market power": the DMCR Guidance indicates that the CMA will not typically seek to rely on case law relating to the assessment of dominance when undertaking an SMS assessment.[9] Given that there is a meaningful degree of overlap between the concepts of "dominance" and "substantial and entrenched market power" (as market power is relevant to both terms), case law on the former should, generally, be taken into account. In circumstances where the Competition Appeal Tribunal in the event of litigation may consider such case law to be a relevant consideration (as the basis for its exclusion is non-statutory), there would be serious risks for the CMA to ignore it completely.

(b) Assessment of "entrenched" market power: relatedly, while the DMCR Guidance acknowledges that "substantial" and "entrenched" are distinct elements, it introduces a presumption that a finding of "substantial" market power will "generally support" a finding that the market power is entrenched.[10] This de facto presumption clearly extends beyond the intention of the Act and should be replaced with factors the CMA considers relevant to determining whether market power is "entrenched", especially in the context of new and evolving technologies.

(c) Power to interview: in breach of an SMS firm's right to due process, the DMCR Guidance limits an SMS firm's ability to understand and respond to the CMA's assessment by suggesting that the "starting point" will be that it will be inappropriate for a legal adviser acting for an undertaking to be present at an interview.[11] Given many of the circumstances in which interviews may be conducted – including in the context of SMS designation – are significantly different to the wrongdoing investigations conducted under the CA98 (where as a starting point the CMA similarly excludes the presence of legal advisers), it is not appropriate to apply a blanket approach to the exclusion of legal advisers in these circumstances.

(d) Senior manager: the Act defines a senior manager as an individual who plays a "significant role" in decision-making, managing or organising an SMS firm's relevant activities.[12] However, the DMCR Guidance unnecessarily limits the employees who may fulfil this role, both with respect to information notices[13] and in the appointment of a nominated officer.[14] The DMCR Guidance should more accurately reflect the Act, and provide an SMS firm with the flexibility to

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9 DMCR Guidance, para. 2.45.

10 DMCR Guidance, paras. 2.42 and 2.52.

11 DMCR Guidance, para. 5.41.

12 DMCC Act, s. 70(3).

13 DMCR Guidance, para. 5.26 – noting that a senior manager in this context "*is likely to be an individual who is a senior executive or executive Board member, or an equivalent level of seniority in an organisation*".

14 DMCR Guidance, para. 6.34 – noting that a nominated officer "*is likely to be a senior manager with operational responsibility for the SMS firm's business model, product design and/or* strategy".

appoint an appropriate person based on the SMS firm's specific organisational structure. This would also ease the regulatory burden on SMS firms, allowing them to leverage their existing and effective compliance structures, such as those implemented to monitor compliance with respect to the DMA that requires only that the compliance function has "*access to*" the relevant management body.[15]

(e) Timing of commitments in relation to CRs: the DMCR Guidance unnecessarily limits the ability for the CMA to accept commitments once conduct investigations have been launched by stating that the acceptance of commitments in such circumstances "*will likely be rare in practice*".[16] This is inconsistent with both the Act[17] and the Explanatory Notes.[18] The CMA should instead maintain flexibility in this regard, especially given commitments can have an important role in defining appropriate compliance, particularly at the outset of the regime where compliance requirements may be less clear.

(f) Timing for remedies in relation to PCIs: while there will be occasions where it will be beneficial for the CMA and SMS firms to engage on remedies at an early stage in the process, the DMCR Guidance should not unnecessarily limit the timeframe in which the CMA will engage in remedies discussions. The DMCR Guidance should: (i) where SMS firms do engage with the CMA at an early stage on proposed PCI remedies, clarify how it will protect SMS firms' procedural rights to avoid prejudicing an adverse effect on competition (***AEC***) finding; and (ii) leave open the possibility of assessing and accepting remedies proposed at a later stage of an investigation given the scope and evidence underpinning any AEC may not be sufficiently clear until later in the investigation. There is no basis in the Act, including with reference to the CMA's duty of expedition, to avoid engagement on remedies at a later stage where it is reasonable to do so.

6. The importance of "bright line" merger control rules

6.1 The DMCC Act introduces, for the first time in UK merger control, significant sanctions for failing to report relevant transactions, without reasonable excuse, to the CMA in advance of closing.[19] While the UK merger control regime has previously been characterised by "non-brightline" concepts, such as the share of supply test and the material influence threshold, the introduction of mandatory notification obligations (with significant financial sanctions for failure to comply) brings with it a requirement for clear and objective thresholds.

6.2 The draft MRR Guidance does not currently provide sufficient clarity in certain places. For example, it does not explain the concept of UK nexus, including the notion of "*carrying on activities in the UK*", which the CMA intends to set out in a forthcoming update of CMA2 (as the test is used in both the mandatory reporting threshold in the digital markets regime and in the new "non-overlap" share of supply test in the ordinary regime).[20] In recent years the CMA has sought to apply the share of supply test fluidly, based on the flexibility that the test (by its nature) provides. This cannot be the case

15 DMA, Article 28.
16 DMCR Guidance, para. 7.76.
17 DMCC Act, s.36(1).
18 DMCC Act, Explanatory Notes, p. 38.
19 DMCC Act, ss. 85(4) and 86(4).
20 MRR Guidance, para. 3.14 *et seq*.

(either as a matter of statutory purpose or practice) with the UK nexus test under the new regime given that the consequences are materially different (i.e. in that there are no fines for a failure to fine under the ordinary merger control regime).

6.3 It is therefore imperative that the CMA should set out a bright-line test for establishing when a business will be considered to be "*carrying on activities in the UK*" so as to give rise to a mandatory reporting requirement under the Act. Any "catch-all" provisions (e.g., references to "any other factors" that the CMA may consider relevant) would be wholly inappropriate in this context.

7. The duty of expedition

7.1 The duty of expedition referred to in the DMCR Guidance[21] is a statutory construct, which has, until now, only been applied within the CMA's merger control regime but will now, going forward, be extended across other areas of the CMA's work, including in relation to the digital markets regime.[22] This duty is framed as requiring the CMA to "*have regard to the need for making a decision, or taking an action, as soon as reasonably practicable*".[23]

7.2 As outlined in the Firm's response to the consultation on the updated CMA6 statement,[24] it is critical that this duty is interpreted appropriately. As with CMA6, the draft Guidance appears to ignore that the duty applies equally to "internal" steps that the CMA takes with respect to how it conducts investigations and evidence gathering (e.g., the scope of information requests and when/how the CMA will use its powers to require persons to carry out demonstrations and tests), as well as steps that involve interactions with the parties involved in those investigations (e.g., requests for information or consultation). The CMA should therefore be required to consider the duty of expedition when, for example, issuing information notices or considering when and how to use its powers to require an SMS firm to carry out a demonstration or test.

7.3 It is also critical that the duty is not and cannot be applied in a way which may override or unduly limit parties' rights of due process. In particular:

(a) Importance of due process: We agree that investigations should generally proceed as swiftly as possible. However, the duty of expedition does not give the CMA "carte blanche" to over-ride the important due process rights held by parties (particularly given the already limited powers of supervision held by courts). It is important that this duty is properly applied in practice and is not used to seek to justify investigative steps that are unlawful or otherwise fall short of the principles of good administration.

(b) The duty of expedition does not weaken the CMA's public law duties: As confirmed by Competition Appeal Tribunal decisions in recent merger cases, the duty of expedition does not weaken public law requirements for the CMA to make sufficient inquiries to respond to submissions made by parties involved in

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[21] DMCR Guidance, para. 9.23 to 9.26.
[22] DMCC Act, s.327.
[23] DMCC Act, s.327.
[24] Transparency and disclosure: the CMA's policy and approach: CMA6 (***CMA6***).

proceedings,[25] or to consult appropriately.[26] It would be beneficial for the Guidance to recognise this expressly.

(c) Deadlines must be reasonable: There is no basis in the DMCC Act for any suggestion that the duty of expedition in any way weakens the requirement for the CMA to set deadlines that are reasonable (e.g., for information gathering) or to consider valid, reasoned requests for extensions of time (or to make the process for requesting such extensions overly burdensome). It would again be beneficial for the Guidance to recognise this expressly.

7.4 In practice, and to guard against the risk of the duty of expedition being mis-applied in practice by individual CMA teams, it may be useful for the Guidance to provide more detail on how the duty will be applied in practice (e.g., by reference to specific activities or aspects of the regime that the CMA may seek to dispose with or accelerate where it considers that this is required by the duty of expedition).

8. Conclusion

8.1 The DMCC Act confers significant powers and discretion on the CMA. The Guidance that accompanies the Act is an essential tool in ensuring proper administration of those powers in a way that benefits – and does not hinder – competition and innovation in the UK. This response outlines our preliminary observations and suggestions on the Guidance, including to ensure due process, transparency, and predictability for SMS firms and third parties. We remain available for further dialogue with the CMA and other stakeholders on the Guidance.

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[25] See JD Sports Fashion plc v Competition and Markets Authority [2020] CAT 24.

[26] See J Sainsbury plc and Asda Group Limited v Competition and Markets Authority [2019] CAT 1, referring to Enterprise Act 2002, s. 104.

Annex

	Reference	Topic	Issue	Suggested revision
A. DMCR Guidance				
Strategic market status (*SMS*)				
1	DMCR Guidance, para. 2.68	SMS investigation procedure	There is currently insufficient information regarding what constitutes *"reasonable grounds"* to open an SMS investigation.[27]	The DMCR Guidance would benefit from additional details around what may constitute "*reasonable grounds*", including the evidentiary threshold required to satisfy this test.
2	DMCR Guidance, paras. 2.4 *et seq*., 2.74 and 2.89(b)	Digital activities	The DMCR Guidance provides limited guidance on the concept of "digital activity" beyond what is set out in the Act.	The DMCR Guidance should provide additional guidance on how it will approach the identification of, and group together, "digital activities". With respect to the scope of "digital activities": (a) the DMCR Guidance should set out examples of the types of activities that could be designated, in order to ensure some consistency amongst designated firms; and (b) rather than providing only a "brief" description of the digital activity and the "overall purpose" of the products included within it, the designation decision should include sufficient detail to allow SMS firms to identify the boundaries of the digital activity (e.g., the minimum specifications of the products the CMA considers to be within the scope of the designated activity).
3	DMCR Guidance, paras. 2.42 and 2.52	Substantial and entrenched market power –	The DMCR Guidance is contradictory and extends beyond the plain wording of section 5 of the Act. It initially acknowledges that 'substantial' and 'entrenched' are distinct elements, but later indicates that "*where the CMA*	Paragraph 2.52 of the DMCR Guidance should be deleted and replaced with guidance on factors relevant to determining whether a firm has 'entrenched' market

27 DMCC Act, ss.9(1) and 11(2)(a)(i).

	Reference	Topic	Issue	Suggested revision
		concept of entrenched	*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*" (emphasis added). This presumption is not supported by the Act and therefore appears to be unlawful.	power, especially in the context of new and evolving technologies.
4	DMCR Guidance, para. 2.45	Substantial and entrenched market power – *overlap with concept of dominance*	The DMCR Guidance indicates that the CMA will not typically seek to draw on dominance case law. While 'dominance' and 'substantial and entrenched market power' may be different legal concepts, there is a meaningful degree of overlap given the relevance of market power for both concepts.	Taking into account the decades of decisional practice and case law relating to "dominance" (without the CMA being bound by this) would provide greater predictability around the assessment of "substantial and entrenched market power". The DMCR Guidance should provide indicative examples of when a firm which is not "dominant" may still have "substantial and entrenched market power" (and vice versa). Similarly, while the DMCR Guidance indicates that the CMA may consider previous CMA investigations as part of its assessment, the CMA should recognise the evolving nature of digital markets and seek to assess, based on engagement with potential SMS firms and the wider market, the extent to which evidence from previous CMA investigations is of relevance and continues to be probative. This dialogue is critical to avoid regulatory missteps and so ought to be explicitly acknowledged in the DMCR Guidance. At present, the DMCR Guidance appears to suggest that a potentially relevant consideration will be discounted as a matter of course (i.e. without any specific assessment of its potential relevance).
5	DMCR Guidance, fn. 31 and para. 2.65	Substantial and entrenched market power – *relevance of evidence and*	The DMCR Guidance notes that underlying evidence and analysis from previous CMA investigations could be relevant to the extent and persistence of market power.	With respect to evidence and analysis from previous CMA investigations, the DMCR Guidance should make clear that: (i) as a preliminary step, it will assess its probative value of based on current and evolving market conditions; and (ii) SMS firms can make representations with respect

	Reference	Topic	Issue	Suggested revision
		analysis from previous CMA investigations	However, digital markets evolve and develop quickly, meaning that evidence from the past may lose evidential value as time passes.	to such evidence and analysis and may provide updated information where possible.
6	DMCR Guidance, paras. 2.46 *et seq.*	Substantial and entrenched market power – *forward-looking assessment*	The draft Guidance provides limited detail around how the CMA will conduct its forward-looking assessment of substantial and entrenched market power.	With respect to any assessment of "*expected or foreseeable developments*",[28] in addition to potential market and regulatory developments, the CMA could consider evolving consumer and business user trends and preferences, technological developments and the emergence of new and rapidly growing entrants. Inevitably, any forward-looking assessment is likely to incorporate a degree of uncertainty. The CMA should be even-handed in its assessment of uncertainty – e.g., where market participants consider that market power is unlikely to be entrenched, the CMA should put significant weight on this evidence (even where there is no direct evidence on how exactly this is likely to happen).
Conduct requirements				
7	DMCR Guidance, paras. 3.27, 3.53 – 3.58 and 3.78	Keeping CRs under review and interpretative notes	The DMCC Act allows the CMA to keep CRs under review and to vary a CR, subject to the same requirements that apply when the CMA imposes a new CR on an SMS firm.[29] The DMCR Guidance goes further than this, envisaging that CRs may be supplemented over time with more detailed requirements or subject to updated interpretative notes to reflect changing circumstances. This risks undermining predictability afforded by the variation process set out in the Act, which may be both unduly burdensome for SMS firms	The DMCR Guidance should clarify: (a) when the CMA envisages that it will use interpretative notes or supplement CRs with additional detail (instead of using the CR variation mechanism set out in the Act);[30] (b) what procedure will be used when supplementing CRs and publishing/updating interpretative notes, including what safeguards

[28] DMCR Guidance, para. 2.47.

[29] DMCC Act, section 19(2).

[30] For example, the DMCR Guidance notes that the CMA may vary a CR in response to "*changes in the market (including changes in technology) or other changes in circumstances in circumstances which mean the competition requirement is no longer appropriate to achieve the intended aim*",[30] while similarly noting that the CMA may update interpretative notes to reflect "*changes circumstances, including changes to technology*". See: DMCR Guidance, para. 6.82(a) and para. 3.56.

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	Reference	Topic	Issue	Suggested revision
			in determining their compliance mechanisms and also detrimental to the experience of UK consumers and businesses.	will be afforded to designated firms. For example, the DMCR Guidance only indicates that the CMA will "typically" publish draft interpretative notes at the same time the CR is being consulted on – and when updating interpretative notes will only "typically" engage with the relevant SMS firms and other stakeholders. It should be made clear that both supplementing CRs and publishing/updating interpretative notes will be subject to consultation; (c) the weight that will be given to interpretative notes – and variations to such notes – in conduct investigations. Maximum clarity is crucial given the likelihood that such interpretative notes will be cited or relied upon by complainants and considered as persuasive evidence by a court in third-party litigation; [31] and (d) the frequency with which the CMA would seek to vary CRs (including by supplementing them) in order to avoid creating undue burdens for SMS firms to comply with CRs and changing the standard of compliance. This should include further guidance on how the nature and significance of the proposed variation affects the variation process, including consultation with affected parties.

[31] For example, while the DMCR Guidance suggests that interpretative notes are non-binding since firms can demonstrate alternative approaches to compliance, if a designated firm decides to take a different approach than what is suggested in the interpretative notes, the DMCR Guidance seems to place an additional obligation on firms to "*demonstrate to the CMA that its approach complies with the terms of the CR*". Such a requirement is a particularly heavy burden in circumstances where the CMA is able to use interpretative notes to "*reflect changing circumstances*" even while the same CR is in force. See: DMCR Guidance, paras. 3.56 – 3.57.

	Reference	Topic	Issue	Suggested revision
8	DMCR Guidance, paras. 3.13 – 3.15	Application of CRs and PCIs to non-designated activities	The terms *"likely"* to increase market power and "*materially"* strengthen strategic significance are not clearly defined.[32] These are important limiting principles that are explicitly provided for by the Act. Given the potentially far-reaching impact of CRs on designated SMS firms and their users, any application to non-designated activities should be interpreted narrowly and follow a rigorous framework.	The DMCR Guidance should clarify when the CMA would be able to impose CRs that impact non-designated activities. In particular, the DMCR Guidance should set out more clearly when an SMS firm would be considered to be designing or operating products in a way that is "*likely*" to increase its market power and/or "*materially*" strengthen its strategic significance in relation to the designated digital activity.
9	DMCR Guidance, para. 3.34	CRs – *parallel SMS investigation and CR consultation*	The DMCR Guidance does not make clear when and how the CMA might carry out an SMS investigation alongside a CR consultation.	The DMCR Guidance should clarify when and how the CMA might carry out an SMS investigation alongside a CR consultation in a way that will not predetermine the outcome of the SMS investigation – for example, via structural separation within the CMA between teams or decision-makers working on each process.
10	DMCR Guidance, para. 3.34	CRs – *use of CR instead of PCI*	The DMCR Guidance does not make clear when the CMA will decide to use a CR instead of a PCI. The possible outcomes of a CR process and a PCI process are materially different, and therefore it will be important for businesses (in considering their engagement strategy) to understand what the CMA's "end game" might be. These are significantly different processes (given, in particular, the legal framework for assessing whether to impose requirements/remedies,[33] and the differences in process and timing). [34]	Greater clarity is needed around the type of conduct PCIs versus CRs are intended to address. For example, the CMA should clarify whether it considers PCIs are the more appropriate tool to deal with, for example, market-wide issues, and therefore whether and when CRs would be used in such circumstances. In particular, the DMCR Guidance should set out the factors that the CMA will consider when deciding between a CR and a PCI.
11	DMCR Guidance, para. 7.62	CRs – *limitation of countervailing*	The DMCR Guidance unnecessarily – and without any justification – limits SMS firms' ability to rely on the CBE where evidence is not entirely "new". This goes beyond the	The DMCR Guidance should remove the expectation that SMS firms should provide "new" evidence, instead noting

[32] DMCC Act, section 20(3)(c).
[33] For example, the requirement for the CMA to assess the CBE in relation to CRs (DMCC Act, s. 29(1)).
[34] For example, the requirement for CMA to provide additional detail on the procedural milestones at the outset of a CR investigation and publish its "notice of findings" on its website at the end of the investigation (DMCC Act, ss. 26 and 28).

	Reference	Topic	Issue	Suggested revision
		benefits exemption	Act[35] and may harm competition and consumers due to the potential gap in time between imposing a CR and a conduct investigation.	that that SMS firms must explain why previous submissions are of relevance. The DMCC Guidance should also clarify how the CMA will assess representations from designated SMS firms regarding proportionality of conduct to the realisation of benefits in relation to the CBE.
12	DMCR Guidance, para. 3.1	CRs – *scope of application to digital activities*	The Act specifies that CRs can be imposed on "a" relevant digital activity.[36] However, the DMCR Guidance does not make clear whether a CR may apply to just one digital activity for which a firm is designated as having SMS or a narrower set of features or functionalities within such SMS digital activity.	The DMCR Guidance should clarify this point by expressly stating whether a CR may apply to a "digital activity" as a whole for which the SMS firm is designated for, or a narrower set of features or functionalities within such SMS digital activity.
13	DMCR Guidance, paras. 3.73 and 4.77	CRs – *transitional, transitory or saving measures*	The scope and time period for which the CMA may impose "transitional, transitory or saving" measures with respect to "expired" CRs (and PCIs) is not clear in the DMCR Guidance. This risks imposing a disproportionate burden on SMS firms in circumstances where the justification for imposing a CR is no longer valid.	The DMCR Guidance should clarify the circumstances / limitations on the scope and time period for which the CMA may impose "transitional, transitory or saving" measures with respect to "expired" CRs (and PCIs).
Pro-competition interventions				
14	DMCR Guidance, para. 4.20	Appropriate PCIs	The DMCR Guidance gives the CMA broad discretion in relation to a range of areas concerning PCIs but does not articulate precisely how these will be designed.	The DMCR Guidance should specify that the CMA will consider proportionality throughout the process – rather than as a last step. This is important to ensure that the PCI is necessary to resolve the alleged AEC and does not unduly restrict innovation and competition or cause consumer harm.
15	DMCR Guidance, paras. 4.41 – 4.59	PCI investigations –	The DMCR Guidance falls short of providing meaningful guidance around timelines for the CMA's engagement with SMS firms during PCI investigations.	The DMCR Guidance should provide more details around the process and timing of PCI investigations, particularly around the arrangements in relation to SMS firms' and

35 DMCC Act, s.29.
36 DMCC Act, section 19(3).

	Reference	Topic	Issue	Suggested revision
		process and timing		third parties' written and oral representations – in order to ensure all parties have a proper chance to respond.
16	DMCR Guidance, para. 6.67	PCI metrics	The DMCR Guidance suggests that effective compliance could in fact require a specific market outcome, irrespective of whether the purpose of the PCI has been achieved. This goes beyond the DMCC Act, as it could result in a situation where an SMS firm is found to not be in effective compliance simply because users do not behave in a way intended.	The DMCR Guidance should specify that whether an SMS firm has complied with a competition requirement is not determined by a particular market outcome.
17	DMCR Guidance, paras. 4.51 and 4.52	Remedies – *statutory timetable*	The DMCR Guidance does not make clear how SMS firms' procedural rights will be protected in the event of early engagement on remedies, nor does it contemplate the possibility of assessing and accepting remedies proposed at a later stage of an investigation. There is no basis in the Act, including with reference to the CMA's duty of expedition, to avoid engagement on remedies at a later stage where it is reasonable to do so.	The DMCR Guidance should: (a) clarify how the CMA will protect SMS firms' procedural rights to avoid prejudicing an AEC finding where SMS firms do, indeed, engage with the CMA at an early stage on proposed remedies; and (b) leave open the possibility of assessing and accepting remedies proposed at a later stage of an investigation.
18	DMCR Guidance, paras. 4.65 – 4.69	PCOs – *testing and trialling*	The DMCR Guidance provides only limited clarity around when the CMA may impose a pro-competition order (***PCO***) on a "trial" basis. This is of concern given the significant time and cost involved with conducting such tests, especially to ensure testing is done in a way that complies with other regulatory obligations.	The DMCR Guidance should clarify that, even where it is possible to test/trial a remedy in advance of implementation, the CMA should also assess whether its use of its testing/trialling power is proportionate, similar to the assessment of whether to require demonstration and testing.
Investigatory and monitoring powers				
19	DMCR Guidance, paras. 5.10 – 5.15	Remedies – *varying conduct or performing a demonstration or test*	The DMCR Guidance provides some detail around when the CMA may require firms to conduct demonstrations or testing, taking into account three overarching factors: value, feasibility and proportionality. However, it is unclear how:	The DMCR Guidance should: (a) make explicit that the CMA should be required to consider the three overarching factors (value, feasibility and proportionality) when deciding

	Reference	Topic	Issue	Suggested revision
			(a) such principles will be applied and when the CMA would use these powers in relation to third parties (i.e. non-designated firms); and (b) the CMA will seek to meaningfully engage with SMS firms on the necessity and scope of any test or demonstration. As above, additional clarity around the scope of such tests is necessary given the heavy burden this will place on SMS firms.	whether to require a firm to vary conduct or perform a demonstration or test; (b) provide additional clarity around how these factors may feed into the CMA's assessment around the scope of such demonstrations or testing, including the geographical scope and duration; (c) specify that demonstrations or testing will only be requested where possible in light of a firm's other regulatory obligations, such as data protection obligations; (d) clarify in what circumstances the CMA would use this power in relation to third parties (as opposed to SMS firms) and whether additional considerations apply in this scenario; (e) be more explicit around how the CMA will seek to meaningfully engage with SMS firms; and (f) note that any variations or demonstrations should be imposed for a limited time period.
20	DMCR Guidance, para. 5.3 *et seq.*, 5.16 and 5.17	Information notices	The CMA's broad powers to request information could impose unnecessary burdens on firms subject to such information requests – a risk that the CMA acknowledges but does not sufficiently mitigate against.	The DMCR Guidance currently only commits to sharing a draft information request "where it is practical and appropriate to do so". The CMA should more firmly commit to sharing a draft information request unless it would not be practical or appropriate to do so. Paragraph 5.9 of the DMCR Guidance, regarding requests for historic changes to algorithm code, is also overly burdensome with no clear basis in the Act. This reference should be deleted.
21	DMCR Guidance, para. 5.41	Power to interview	The DMCR Guidance on interviews conflicts with SMS firms' right to due process by limiting an SMS firm's ability to understand and respond to the CMA's assessment.	The DMCR Guidance should be revised to state that an SMS firm's legal advisers may be present during interviews.

	Reference	Topic	Issue	Suggested revision
			Certain circumstances in which the CMA can use its interview powers under the DMCC Act – such as in the context of SMS designation and the imposition of CRs – are significantly different to wrongdoing investigations under the CA98[37] where the CMA similarly excludes the presence of legal advisers as a starting point. Given such interviews under the DMCC Act involve no element of wrongdoing, we do not consider the approach taken under the CA98 should be extended here.	
22	DMCR Guidance, paras. 5.75 – 5.80	Duty to preserve information	The DMCR Guidance adopts a broad and unreasonable interpretation of when a person knows or suspects that a breach / PCI investigation is being or is likely to be carried out, and, thus, is under a duty to preserve such information. This broad interpretation is simply not practical and realistic considering the global nature of digital firms where it is unreasonable to expect that any individual within an SMS firm will have knowledge of such an investigation.	The DMCR Guidance should adopt a more principled approach by recognising that such persons could be individuals with sufficient proximity to the SMS firm's compliance to the Act.
23	DMCR Guidance, para. 5.26	Appointment of a "senior manager" in relation to information notices	The DMCR Guidance goes beyond the requirements set out in section 70 the Act by creating additional restrictions on who an SMS firm may appoint to be a "*senior manager*" responsible for compliance with an information notice.	To align with the spirit and wording of the Act, the CMA should remove these restrictions. The DMCR Guidance should ensure SMS firms have flexibility to assess on a case-by-case basis based on the specific definition of "senior manager" in the Act: (a) who within their organisation is best placed to ensure compliance on the basis of expertise, oversight and availability; and (b) whether it would be appropriate to appoint more than one senior manager to ensure compliance with a specific information notice. This is particularly important given the wide discretion

37 CMA8, para. 6.21.

	Reference	Topic	Issue	Suggested revision
				the CMA has with respect to the scope and content of information notices.
24	DMCR Guidance, paras. 6.28 – 6.39	Nominated officer	The DMCR Guidance on the appointment of a nominated officer deviates from the requirements under section 83 of the Act. While the Act defines a nominated officer with reference to the definition of "senior manager", the DMCR Guidance further limits who can fulfil this role and narrows the opportunity for SMS firms to leverage existing compliance structures put in place for other similar regimes (for example, Article 28 of the DMA).	The DMCR Guidance should remove the limitation on who can fulfil the role of a "nominated officer" and adopt a position that is aligned to the specific requirements of the Act.
25	DMCR Guidance, para. 6.28	Nominated officer	The DMCR Guidance suggests that multiple nominated officers could be in place within a firm in relation to a number of relevant competition requirements, however this is not directly addressed.	The DMCR Guidance could clarify explicitly situations in which multiple nominated officers could be appointed.
26	DMCR Guidance, para. 5.65 *et seq.*	Reports by skilled persons	The DMCR Guidance does not provide any clarity on: (i) the process the CMA will adopt when appointing a skilled person; or (ii) in circumstances where the undertaking itself is to appoint a skilled person, why the CMA intends to require the relevant undertaking to launch a tender process before appointing a skilled person.	For scenarios where the CMA appoints a skilled person, further guidance is needed with respect to whether or how the relevant undertaking will be consulted in advance of any appointment by the CMA, and how and to what extent any concerns lodged by the relevant undertaking will be taken into account by the CMA regarding the appropriateness and/or conflicts position of the nominated skilled person. For scenarios where the undertaking is to appoint a skilled person, the DMCR Guidance should explain why it would be necessary to require an undertaking to launch a tender process before appointing a skilled person. In these circumstances, the relevant undertaking should be permitted to appoint a skilled person which, in its reasonable opinion, possesses the requisite expertise to opine on the matters under investigation.

	Reference	Topic	Issue	Suggested revision
27	DMCR Guidance, para. 7.28	Disclosure of evidence	The DMCR Guidance envisages scenarios where it may be acceptable to only disclose the "gist" of evidence to an SMS firm. This would prevent SMS firms from properly accessing evidence and making proper representations which is especially problematic in light of the potential intrusiveness of CRs and PCIs.	It is essential that the DMCR Guidance acknowledges more explicitly an SMS firm's right to properly access the CMA's file, given the importance of safeguarding an SMS firm's right to due process. The DMCR Guidance should at least be aligned with the approach adopted in other CMA investigations, such as CMA8, which acknowledges that access to file ensures "*that [firms] can properly defend themselves*".[38]
Enforcement of competition requirements				
28	DMCR Guidance, chapter 7, in particular paras. 7.1, 7.18, 7.20 and 7.28	Engagement with third parties	The DMCR Guidance provides details around the enforcement of competition requirements, however it makes passing references only to the CMA's engagement with SMS firms and third parties.	The DMCR Guidance should provide additional clarity around: (a) the engagement process, including details around how the CMA will communicate its initial thinking and provide regular updates to SMS firms (such as via State of Play meetings); and (b) how representations from SMS firms and third parties will be considered by the CMA. Clarity in these areas would be consistent with existing CMA guidance, including the CMA's guidance on market investigations and CA98 investigations and would ultimately ensure effective administration of the digital markets regime.[39]
29	DMCR Guidance, paras. 6.58, 6.59, 6.61 and 7.76	Participative resolution	Participative resolution is potentially an important tool, but very limited information is provided about how it will be used, including the circumstances in which it will be considered suitable and how it will work in practice.	The DMCR Guidance would benefit from further information on how participative resolution would be used; for example, from worked examples to demonstrate how the process will work.

38 CMA8, para.11.21.

39 CMA8, para. 9.8 *et seq*.

	Reference	Topic	Issue	Suggested revision
30	DMCR Guidance, para. 7.76	Commitments	The indication that the CMA will rarely accept a commitment once a conduct investigation has been launched: (i) unnecessarily limits the application of the CMA's power under section 36(1) of the Act which provides the CMA with the power to accept appropriate commitments from an SMS firm subject to a conduct requirement; and (ii) is inconsistent with the Explanatory Notes,[40] which specifically provide an example of a commitment being accepted after a conduct investigation has been opened. There is no need for the DMCR Guidance to limit commitment discussions in this way given commitments can have potentially important role in defining appropriate compliance particularly at the beginning of the regime.	Paragraph 7.76 of the DMCR Guidance should be removed. We would encourage the CMA to maintain a flexible approach to the acceptance of commitments. However, the DMCR Guidance should also clarify the level of information that will be provided during the initial assessment phase (prior to the opening of an investigation) in order that SMS firms can properly formulate appropriate commitment proposals.
31	DMCR Guidance paras. 7.116 – 7.125, 7.139	Final offer mechanism (***FOM***)	Beyond clarifying that the FOM will be used as a last resort and that the CMA does not intend to position itself as a price-setter, the DMCR Guidance is silent on many other important procedural aspects of the FOM. Additionally, the DMCR Guidance is circular in noting that, in deciding whether the FOM is appropriate, the CMA will consider whether the nature of the transaction is "complex", but then defining "complex" with reference to the difficulty of determining appropriate payment terms without the FOM.	Clarity is required on the CMA's use of the FOM. To provide stakeholders with much needed legal certainty in this area, we would urge the CMA to: (a) explain how the FOM will be used in a way that does not restrict an SMS firm's freedom of contract, which itself is an important consideration in the imposition of a CR;[41] (b) identify the factors it will consider when assessing the final offer payment terms proposed by the SMS firm and the third party under section 41(2) of the Act. It would be beneficial for both SMS firms and third parties if the CMA provided a list of the factors it is likely to consider in evaluating the strength of the relevant evidence; and

40 DMCC Act, Explanatory Notes, p. 38.
41 DMCC Act, Explanatory Notes, para. 180.

	Reference	Topic	Issue	Suggested revision
				(c) clarify when the CMA may use FOMs rather than alternative measures (such as PCOs) or varying enforcement orders for CRs. Additional clarity would be welcome on when the CMA considers it would be "difficult" to determine payment terms using alternative measures, such as CRs or PCIs.
Penalties for failure to comply with competition requirements				
32	DMCR Guidance, paras. 8.11 and 8.14	Whether to impose a penalty and the type of penalty imposed	If a failure has been remedied, it will likely be disproportionate to impose a daily penalty in addition to fixed penalty.	The DMCR Guidance should provide clarity on the specific circumstances in which it would be appropriate for the CMA to impose both a fixed and a daily penalty where a failure has been remedied. In this respect, paragraph 8.14 of the DMCR Guidance merely repeats factors listed in paragraph 8.11.
33	DMCR Guidance, para. 8.11(c)	Whether to impose a penalty and the type of penalty imposed	The DMCR Guidance does not clarify or explain how the CMA intends to determine whether an infringing undertaking has reported a failure to comply "*swiftly*" after becoming aware of that failure. Given that this is a factor that is taken into consideration by the CMA when determining whether to impose a penalty, it is important that this is clear.	The DMCR Guidance should clarify or explain how the CMA will determine whether an infringing undertaking has reported a failure to comply "*swiftly*" after becoming aware of the failure in practice.
34	DMCR Guidance, chapter 8	Reasonable excuse	CMA4 helpfully describes what might constitute a "*reasonable excuse*" with further practical examples given at Annex A.[42] However, the DMCR Guidance does not demonstrate this as clearly.	If "*reasonable excuse*" for the purposes of application of the Act is intended to have the same meaning as in the guidance in CMA4, it would be helpful to cross refer to CMA4. To the extent the CMA envisages any additional circumstances which might constitute a reasonable excuse in relation to the Act, the DMCR Guidance should set out examples of such circumstances.

[42] Administrative penalties – the CMA's approach: CMA4 (***CMA4***), paras. 4.4 and 4.5 and Annex A.

	Reference	Topic	Issue	Suggested revision
35	DMCR Guidance, para. 2.26(b)	Determination of relevant turnover	It is not clear why the DMCR Guidance proposes to use an undertaking's whole UK turnover in the relevant period. This is more onerous than the starting amount used, for example, for CA98 infringements, which is limited to turnover of the undertaking in the relevant product market and relevant geographic market.	The CMA should limit the relevant turnover to that pertaining to the digital activity to which the infringement relates.
36	DMCR Guidance, para. 8.7(b)	Determination of relevant turnover	The DMCR Guidance does not confirm how the CMA will determine daily turnover for an undertaking, which is relevant to the maximum amount of any daily penalty.	The method which the CMA will use to determine daily turnover for an undertaking should be clarified in the DMCR Guidance.
37	DMCR Guidance, para. 8.25 and fn. 549	Determination of relevant turnover	The DMCR Guidance does not state expressly what rate or rates of exchange it will use where relevant information it uses is not expressed in pounds sterling.	The DMCR Guidance should confirm whether, in circumstances when the relevant information is not expressed in pounds sterling, it will apply the relevant rate or rates of exchange from the time at the point of the failure, or from the time when the fine is actually imposed.
38	DMCR Guidance, paras. 8.29 and 8.33	Assessment of *seriousness*	With respect to the factors the CMA will take into account when assessing seriousness of harm: (a) unlike CMA73,[43] the DMCR Guidance does not give examples of the types of failures that it considers most serious and most likely to cause harm; and (b) the DMCR Guidance refers to "approximate" actual or potential benefits and effects (unlike the corresponding paragraphs in CMA73), which is vague, including as to how the CMA would measure such benefits and effects. This is also relevant to step 2 of the penalty calculation under paragraph 8.33 of the DMCR Guidance.	The DMCR Guidance should provide additional clarity on: (a) what the CMA understands the factors it takes into account when assessing seriousness and harm to mean; and (b) how the CMA proposes to measure these factors.

43 CMA's guidance as to the appropriate amount of a penalty: CMA73 (***CMA73***).

	Reference	Topic	Issue	Suggested revision
39	DMCR Guidance, para. 8.33	Penalty adjustment for deterrence	The DMCR Guidance notes that it is "necessary" to impose "*significant penalties*" for the purposes of deterrence given the significant financial position required of an undertaking by the SMS turnover condition. Given the CMA must assess any failures on a case-by-case basis and there may be many different circumstances where a significant penalty is not necessary, the DMCR Guidance should not as a general rule or principle state that fines must be significant. There is no basis (including in the Act) for such a blanket statement.	The reference to "*significant penalties*" being "*necessary*" should be deleted.
40	DMCR Guidance, para. 8.38(a) and fn. 553	Penalty adjustment for aggravating or mitigating factors	The DMCR Guidance is not clear on how a party exercising its rights of defence might interact with the mitigating factors listed.[44]	The DMCR Guidance should provide further guidance on the interaction between potential mitigating factors and the full exercise of the party's rights of defence.
41	DMCR Guidance, para. 8.38 and fn. 553	Penalty adjustment for aggravating or mitigating factors	Under CMA73, which sets out the basis on which the CMA will calculate penalties for the infringement of CA98, the CMA will not generally make any reduction on the grounds of the novelty of the infringement.[45] However, this guidance is clear that a reduction may be warranted in certain limited circumstances. Given the *ex ante* nature of the DMCC Act and the novelty of the regime and potentially products in question, this creates uncertainty for those with SMS status.	It would also be helpful for the CMA to explicitly clarify in the DMCR Guidance that the novelty of any failure may be considered a mitigating factor in the assessment of any penalties under the Act.
42	DMCR Guidance, paras. 8.39 – 8.42	Penalties – proportionality	We agree with the steps set out at step 4. Further guidance could be offered to ensure clarity on the CMA's position.	The DMCR Guidance should provide fuller guidance on the factors the CMA may take into account when

[44] For example, at paragraph 8.38(a) of the DMCR Guidance, if a party appealed a CMA intervention, which at least in the near future is likely to involve novel products and the application of an untested regulatory regime, it is not clear whether it would be penalised for not ceasing the failure following the CMA's intervention. The same question applies for the factor at paragraph 8.38(c) of the DMCR Guidance, which lists in a very broad manner "*the involvement of directors, senior management or officers*" as a potentially aggravating factor. Given that it is common for such individuals to be involved in technical operational decisions across companies, this could potentially lead to a systematic uplift on every penalty decision.

[45] CMA73, paras. 2.25 – 2.27.

	Reference	Topic	Issue	Suggested revision
				assessing proportionality (in line with the approach in CMA73[46]), in addition to checking the penalty does not exceed the statutory maximum. In addition, the DMCR Guidance should state expressly that the CMA will take into account any fines and penalties imposed on the same undertaking in relation to an infringement finding involving the same facts of other national rules, and the overall level of fines and penalties imposed (in line with the principle of *ne bis in idem*).
43	DMCR Guidance, paras. 8.45 – 8.48	Provisional penalty notice	While the CMA has discretion to determine the period within which parties can make representations on any provisional penalty notice, CMA8 provides additional guidance on potential extensions to the deadline for representations, and a procedure which parties should follow.[47] It is not clear from the DMCR Guidance whether parties are able to request extensions at all, and it is not clear why this has been omitted.	The DMCR Guidance should (a) clarify whether parties are able to request extensions; (b) provide examples of relevant circumstances where an extension will be granted; (c) set out the procedure for requesting an extension; and (d) set out a procedure for raising any complaints about the deadline set.
Administration				
44	DMCR Guidance, paras. 9.2 – 9.5	Extension period for special reasons	The DMCR Guidance on the "*special reasons*" which might justify an extension of the normal time limits under the Act does not give sufficient clarity for parties subject to investigation on when such an extension might apply.	In relation to the CMA's extension of the timeline for review of Phase 2 cases, the CAT confirmed in *Cérélia v CMA* that special reasons should take the form of "*good, case-specific reasons which justify an extension of the normal time limit*",[48] thereby echoing similar guidance in CMA2.[49] We suggest this interpretation of the term is reflected in the DMCR Guidance for consistency of

46 CMA8, para 11.16.
47 Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8, para. 12.3.
48 Cérélia v Competition and Markets Authority [2023] CAT 54.
49 Mergers: Guidance on the CMA's jurisdiction and procedure: CMA2 (***CMA2***).

	Reference	Topic	Issue	Suggested revision
				interpretation and further clarity on the meaning of the term. It would also be helpful for the CMA to explain more fully what would constitute "*new relevant information*" in this context, for example with reference to how material this should be to the case, who such information might come from, and how the CMA will engage with the parties subject to investigation in relation to such new information.
45	DMCR Guidance, para. 9.8	Extension period for failure to comply	The CMA's ability to apply the "*stop the clock*" extension on an unlimited basis may lead to parties – who may be making best endeavours to comply with challenging requests from the CMA as noted below in relation to the duty of expedition – facing very long investigations.	The DMCR Guidance should ideally make clear that the role of the Procedural Officer as set out in the relevant guidance extends to investigations under the Act, providing a channel for parties to raise procedural issues (such as this).[50] The Procedural Officer guidance should be accordingly updated.
46	DMCR Guidance, paras. 9.16 – 9.22	Transparency	The DMCR Guidance is underdeveloped on transparency, and the final sentence of paragraph 9.22 of the DMCR Guidance gives the CMA very wide discretion in relation to activity that could potentially involve disclosure of parties' confidential information to external stakeholders.	The DMCR Guidance should at a minimum cross refer to relevant guidance in CMA6 and state expressly that that guidance applies to the CMA's digital markets functions. The CMA should also commit to review and update the DMCR Guidance on transparency as the digital markets regime develops.
47	DMCR Guidance, paras. 9.23 – 9.26	Duty of expedition	The DMCR Guidance is not sufficiently clear on what the "*duty of expedition*", provided for in section 327 of the Act, requires, to ensure the duty is properly applied in practice, and not used to seek to justify investigative steps that are unlawful or otherwise fall short of the principles of better regulation.	The DMCR Guidance should provide clearer and more detailed guidance on how it will use the duty of expedition in practice, for example how the duty should guide the CMA's decision making, taking into account due process considerations. The DMCR Guidance should also provide indicative examples of the circumstances in which the CMA may progress its investigations more quickly than the timelines set out in the DMCR Guidance or statutory deadlines,

50 Procedural Officer: raising procedural issues in CMA cases.

	Reference	Topic	Issue	Suggested revision
				including in relation to specific investigation steps such as setting deadlines for information requests, and responding to parties' requests for extensions to deadlines for information requests or submissions. It would also be useful for the DMCR Guidance to set out examples of the circumstances in which the CMA will be typically inclined to grant or refuse parties' requests for extensions to information requests.[51]
48	DMCR Guidance, para. 9.38	Coordination with other regulators	The DMCR Guidance does not set out clearly whether the CMA would share parties' confidential information if seeking input from the wider regulatory community in the exercise of its functions.	The DMCR Guidance should address: (a) which gateway(s) the CMA would rely on to share confidential information with other regulators; (b) how the CMA intends to use those gateways and what process will be adopted (e.g., whether a waiver will need be granted, or whether parties will be informed of such disclosure or have an opportunity to make representations before information is disclosed); and (c) the procedural safeguards that would apply, as set out in the section 326 of the Act (amending Part 9 of EA 2002) and CMA6.
49	DMCR Guidance, para. 9.38	Coordination with other regulators	The DMCR Guidance does not state expressly whether the CMA would make parties aware that they are seeking such input from other regulators, including whether there are certain circumstances in which the CMA considers it would not be appropriate to do so. Parties need to be aware of whether other regulators are involved in any investigation, particularly if parties are subject to reporting requirements.	The DMCR Guidance should address these circumstances expressly.

[51] While such requests are invariably fact-specific, the CMA has been able to provide guidance (for example) on the types of derogations that are commonly granted – or not – to interim enforcement orders, even though these are similarly fact-specific requests.

	Reference	Topic	Issue	Suggested revision
B. MRR Guidance				
Merger Reporting				
50	MRR Guidance, para. 3.1, para. 3.12 and para. 3.14 *et seq*.	UK nexus	The Act on its face can give rise to a mandatory reporting requirement by way of a very thin link to the UK, e.g., through the sales of goods by the target through an indirect link the UK.[52] Cases where such a remote link can give rise to a reporting obligation need to be clearly set out in the MRR Guidance. This is particularly the case where the duty to report captures forward-looking assessments where SMS Acquirers "*intend or expect*" that new joint ventures will have links to the UK, which the MRR Guidance currently states will be based on "*all available evidence in the round*". This type of forward-looking assessment is inherently subjective and not appropriate for determining mandatory reportability.	The MRR Guidance should set out the CMA's view on the concept of "*carrying on activities in the UK*". The MRR Guidance (and any future consultation) should include a bright-line test for establishing UK nexus – a vague, catch-all provision (such as reference to "any other factors" would not be appropriate).
51	MRR Guidance, para. 4.2 and fn. 36	Report submission timing	The MRR Guidance suggests that a report will only be accepted where a transaction has the same level of certainty as that required to commence pre-notification in ordinary merger notification proceedings (i.e. a *"good faith*" intention to proceed),[53] rather than the higher standard applied to consider a MIC briefing paper (i.e. a "*binding*" commitment to proceed).[54]	The MRR Guidance should clarify this position and confirm whether the CMA will continue to accept briefing papers in relation to reportable mergers and, if so, at what point in time. It seems duplicative for parties wishing to approach the CMA with a briefing paper to file, and for the CMA to consider, two papers regarding the same transaction at separate points in time.
52	MRR Guidance, paras. 1.3, 5.12 and 5.17	Report submission timing	In these paragraphs, the MRR Guidance suggests that the standstill requirement prevents *completion* of the transaction. This risks confusion given that the Act provides (as reflected in paragraph 4.1 of the MRR Guidance) that a reportable event is to be treated as taking place when an	The MRR Guidance should be amended to clarify that the standstill obligation will usually apply before this point (in the case of share purchase agreements).

52 DMCC Act, s.57(5)(b).
53 Mergers: Guidance on the CMA's jurisdiction and procedure: CMA2, para. 6.14.
54 Guidance on the CMA's mergers intelligence function: CMA56, fn. 7.

	Reference	Topic	Issue	Suggested revision
			acquirer becomes unconditionally obliged to acquire shares/voting rights.	
53	MRR Guidance, para. 4.4	Report submission timing	The MRR Guidance notes that the duty to report does not apply in relation to a reportable event if it "*does not differ in any material extent*" from an event already reported under section 57(1) of the DMCC Act, or it has already been notified to the CMA through a merger notice under section 96(1) of the Enterprise Act 2002.	The MRR Guidance should provide guidance in relation to this materiality threshold. For example, presumably any change in consideration or transaction structure (e.g., a change in the specific acquiring entity within the same group) would fall within this materiality exception, but a change in the scope of the transaction or an increase in shareholding above a reportable threshold would not.
54	Draft SMS merger reporting notice	Merger reporting requirements	The draft SMS merger reporting notice does not currently ask whether the transaction will be notified to the CMA under its general merger reporting regime (question 5 of the notice currently only asks whether the transaction has been or will be notified to any other competition authority).	The draft SMS merger reporting notice should be amended to include this question.
55	MRR Guidance, para. 5.16	Decision to investigate during Waiting Period	The MRR Guidance only contemplates the imposition of Initial Enforcement Orders (***IEO***) in relation to investigations opened during the Waiting Period. This misstates the applicable test under section 72 of the Enterprise Act 2002, which should be cross-referred to. This test allows the CMA to impose an IEO to prevent pre-emptive action where "*the CMA is considering whether to make a reference* [...] *and has reasonable grounds for suspecting that it is or may be the case that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct*".[55] Further, it fails to take into account the low likelihood of pre-emptive measures in an anticipated merger – i.e. where the CMA will consider interim measures "*where the steps which the parties are taking, or are about*	This reference should be amended to ensure that it accurately reflects the applicable test under section 72 of the Enterprise Act 2022 and that it takes into account the low likelihood of pre-emptive measures in an anticipated merger.

[55] Enterprise Act 2002, section 72.

	Reference	Topic	Issue	Suggested revision
			to take, would be prohibited if the standard template Interim Measures were in force".[56]	
56	MRR Guidance, paras. 5.20 – 5.21	Role of third parties	While the MRR Guidance explains the position of the SMS Acquirer and "third parties", no guidance is provided in relation to how the target business fits into the CMA's information-gathering framework.	The MRR Guidance should explain the CMA's intended approach to information-gathering with the target business (e.g., whether the CMA expects, in practice, to engage only with the SMS Acquirer in the event of queries about whether a report is complete, or whether it might also/alternatively engage with the target in some circumstances).
57	DMCR Guidance, para. 9.38 MRR Guidance, para. 5.24	Role of third parties	The MRR Guidance does not set out clearly whether the CMA would share parties' confidential information in order to seek input from other regulators, and if so: (a) which gateway(s) the CMA would rely on to share confidential information with other regulators; (b) how the CMA intends to use those gateways and what process will be adopted (e.g., whether a waiver will need be granted; whether parties will be informed of such disclosure, have an opportunity to make representations before information is disclosed); and (c) the procedural safeguards that would apply, as set out in the Act (amending Part 9 of the Enterprise Act 2002) and the CMA's transparency and disclosure guidelines.[57] It is important for parties to be aware of whether other regulators are involved in any investigation, particularly if parties are subject to reporting requirements.	The MRR Guidance should address these points clearly to give parties greater certainty around the circumstances in which confidential information would be shared.

[56] Interim measures in merger investigations: CMA108, para. 2.22.
[57] DMCC Act, s. 326; Transparency and disclosure: Statement of the CMA's policy and approach: CMA6, section 7.