

## **CMA consultation on Digital Markets Competition Regime Guidance: response from Gener8**

### **Overarching comments**

We commend the CMA for producing such a comprehensive and thorough document. It is extremely well set out, well written, and provides a clear foundation for implementation of the new regime. We consider the guidance to be entirely aligned with both the content of the Act, and the intended spirit of the regime.

Importantly, we consider the intended balance between flexibility, certainty and proportionality afforded by the Act has been pragmatically translated into functional processes and principles.

The guidance has also helpfully confirmed some important details that were not included explicitly within the Act. Most importantly in our view, it documents how, when, and under which conditions, the CMA intends to adopt a participative approach towards addressing or preventing harm. As we have set out in previous written and oral evidence, we consider that having this participative approach baked into the regime is critical if the regime is to be effective at the necessary pace and scale.

We also welcome that, in line with the Act, the burden of proof has been firmly placed on SMS firms to justify their harmful conduct, rather than placing impossible and unreasonable demands on the CMA. Given the scale of harm to competition and innovation under the status quo, this balance is essential and must be maintained, including in relation to the countervailing benefits exemption.

On this basis, we overwhelmingly support the draft guidance as a means to implement the new pro-competition regime. We will be urging the new Secretary of State to approve the guidance without major revision as soon as possible.

Beyond this overarching support, we have set out below a series of more detailed suggestions or points of feedback. This feedback is based on our experience of engaging with firms that we expect to be designated with Strategic Market Status, and thus the examples or scenarios we are seeking to gain clarity on are not hypothetical.

## Chapter specific feedback

### **Chapter 2: Strategic Market Status**

#### *Forward looking SMS assessments*

In relation to forward-looking assessments of substantial and entrenched market power, the CMA has set out some conditions (para 2.49) that may affect the firm's market power in future. We anticipate one area of contention in this context may be the spillover effects from related regulatory interventions in other jurisdictions (e.g. the Digital Markets Act in the EU). The document would benefit from some recognition of this complex issue, with some indication of if or how the CMA may seek to take account of it.

In line with our comments above about the burden of proof, we welcome the statement in para 2.52 that a finding of substantial market power will generally support a finding that market power is entrenched, unless there is clear and convincing evidence to the contrary. This is the correct baseline for this analysis in these circumstances.

#### *Conditions for strategic significance*

The subsequent section explaining the conditions for assessing whether a digital activity is of strategic significance provides helpful detail. Particularly helpful from our perspective is the detail provided in relation to the fourth condition, which is that “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 of otherwise”. In respect of point (c), we urge the CMA not to focus too narrowly in its thinking on access to platforms, but also to think more broadly about permissions to integrate with services and technology. For example, the permissions and rules surrounding API access can have the identical gatekeeping effect as those around listing on app stores or marketplaces. We would therefore recommend that point (c) is framed more broadly, or to introduce an additional point (d): *when the potential SMS firm operates and controls access to a service or technology that serves as a foundation for complementary markets or innovation, for example through APIs or other developer integrations.*

#### *Outcome of SMS investigations*

Although we appreciate why the flexibility is helpful to the CMA, we have some concerns regarding the potential for SMS investigations to be closed without a decision. Closing without a decision in this way could be extremely frustrating for stakeholders that have invested time and resources engaging with the process, which in turn could harm future engagement due to perceived risk it might be dropped.

As it stands there is little in the guidance to determine how the CMA will differentiate between a decision not to designate, and a decision to close without a decision. We would welcome some additional clarity or guidance here to provide more confidence for future engagement.

#### *Further SMS designations*

While recognising that this terminology is taken directly from the Act, we anticipate it causing some confusion amongst stakeholders as it is so open to interpretation. In particular, we anticipate confusion amongst stakeholders between the intended concept and circumstances where the CMA is undertaking an additional SMS investigation for the same firm in new unrelated digital activities. The phrase ‘a further SMS investigation in relation to Company X’ could easily be misused or misinterpreted in that context.

We recommend that as a minimum the CMA is mindful of this risk in its future communications. If possible, we would recommend the CMA adopting or defining alternative more informative terminology, such as primary and secondary SMS investigations. Primary investigations would be the first one for a given digital activity, whereas the secondary investigations would be those circumstances listed in the draft guidance (para 2.94) as ‘further’ investigations.

In circumstances where the CMA decides through a further SMS investigation to revoke a designation, it could potentially have catastrophic consequences for some businesses that have built or innovated on top of the existing obligations. We are concerned that the decision on whether or not to retain existing obligations will be managed within the further SMS investigation.

Instead, we would recommend that such decisions are subject to a separate, subsequent consultation in order to ensure that the CMA sufficiently engages with the potential affected stakeholders. There is a risk that if carried out together with the decision to revoke the designation, the potentially long tail of affected stakeholders may not appreciate or be aware of the importance of the consultation.

### **Chapter 3: Conduct requirements**

#### *The CMA’s analytical approach*

The guidance relating to Section 20(3)(c) of the Act is helpful detail, setting out in what circumstances CRs could apply to non-designated activities. This is an important component and key to the effectiveness of the new regime, given the increasing integration and expansion of digital ecosystems over the last decade.

With regard to the CMA’s analytical approach, we would welcome more detail on how the CMA might determine the link between the designated activity and a non-

designated activity, and how direct or indirect these effects might be. For example, we would welcome if the CMA would clarify explicitly in its guidance:

- Whether it will take into account the impact on potential future competition, such as in circumstances where other firms may in future be expected to enter and compete with the SMS firm in the designated activity if their growth is not held back by the SMS firm's conduct within non-designated activities.
- Whether the CMA would consider circumstances where other firms do not compete directly with the SMS firm in the designated activity, but their access to or integration with non-designated activities means that they can enable better competition in the designated activity by other firms (e.g. through the supply of data or intelligence that lowers the barriers to entry for other firms).

#### ***Chapter 4: Pro-competition interventions***

##### *Scope of a PCI*

We would welcome additional clarity in the guidance as to whether the CMA can consider an AEC where it occurs in a connected market, but in circumstances where the SMS firm is not active in that market. For example, removal of restrictions in a designated activity could unlock competition and growth in one connected market, which in turn could help to promote competition or undermine market power in the designated activity.

We believe this point is important, as often in digital ecosystems it is rarely as straightforward as there being two connected markets where the same firms operate in both of them. In many cases, there are strong incentives for SMS firms to hold back nascent disruptive markets and technologies that the SMS firm does not wish to compete in itself, but simply wishes to constrain due to the threat it poses to its own business model.

It is important that these potential indirect links between a factor and an AEC can be identified and addressed by the CMA through a PCI.

##### *Identifying effective PCIs*

Although we recognise that it will be case and context specific, the guidance would benefit from some discussion over how prescriptive and detailed the CMA expects PCOs to be, and what form a PCO might take.

As part of this, it would be helpful to provide some guidance on how the CMA will determine how detailed and prescriptive a PCO should be, and in what circumstances it will choose to set out very detailed requirements.

In this context, the guidance could also helpfully include some reference to if, or how the CMA may seek to explicitly rule out or prevent anticipated circumvention tactics by the SMS firms.

In addition, within its non-exhaustive list of examples of potential behavioural remedies, we urge the CMA to include some explicit reference to data portability here, in line with the original blueprint of the Furman Review, and with the EU's Digital Markets Act. As it stands, this appears to be a surprising omission. We therefore request the CMA introduces the following additional example:

- *requiring the SMS firm to provide end users, and third parties operating on their behalf, with effective data portability solutions, enabling users to transfer their personal data to third-party services of their choosing on continuous and real-time basis.*

#### *The proportionality assessment*

There may be circumstances where an SMS firm insists that it must incur costs from a PCI on a global basis, despite the benefits only being afforded to UK consumers. We recommend that the CMA sets out within its guidance how it will address these circumstances to minimise the risk of future challenge.

### **Chapter 5: Investigatory powers**

No comment. We fully support the draft guidance for use of investigatory powers.

### **Chapter 6: Monitoring**

#### *Monitoring compliance*

As set out in para 6.52, the guidance indicates that the CMA will specify the information that the SMS firm must include in the summary compliance report. Our experience of attempting to draw from the gatekeepers' compliance reports in response to the DMA was extremely mixed. While some of the reports were comprehensive and useful, others were very high level and extremely poor quality. We recommend the CMA seeks to learn lessons from the experience in the EU on this issue, and proactively take action to ensure that all of the SMS firms meet its expectations from the outset.

We note that where compliance concerns are identified, the guidance sets out explicitly that the CMA may adopt a participative approach to resolving them. The detail on when a participative approach might be adopted, and what this approach might look like, is in our view the most valuable additional information provided by the document. We

anticipate this approach addressing more harm than formal enforcement by at least an order of magnitude.

#### *Varying or revoking competition requirements*

The guidance helpfully sets out a range of reasons that may lead the CMA to vary or revoke a competition requirement. It appears that the list omits what is in our view the most important and likely reason to introduce variations. Specifically, the CMA should specify that it could vary a competition requirement in response to deliberate circumvention strategies by the SMS firm. For example, if the SMS firm is finding a way to comply with the letter of the requirement, while undermining the spirit or intent of it, then the CMA should be clear that it will act decisively to amend the requirement to address this.

### **Chapter 7: Enforcement of competition requirements**

#### *Investigations into suspected breaches of competition requirements*

In addition to the guidance within Chapter 6 in relation to monitoring, we welcome the additional clarity in Chapter 7 regarding the CMA's intended participative approach. We strongly agree that the initial assessment and any subsequent investigation (as referenced in para 7.9) should follow the initial attempts to address concerns without enforcement. This will provide all parties with the appropriate incentives to engage in good faith in the participative process.

#### *The CBE*

We strongly support the reference (in para 7.68) to the indispensability test in section 9(1)(b) of the CA98, and the CMA's intention to have regard to the interpretation of that test.

### **Chapter 8: Penalties for failure to comply with competition requirements**

No comment. We fully support the draft guidance for applying penalties.

### **Chapter 9: Administration**

No comment. We fully support the draft guidance for how the regime will be administered.

## **Timing**

With respect to this new regime, the most important priority for the CMA and for the incoming government must be urgency. We need to see this regime implemented as soon as possible, with a view to multiple SMS investigations starting this calendar year.

We will be urging the new Secretary of State to approve this guidance and to support commencement of the regime without delay.