International Center for Law & Economics

Comments of the International Center for Law & Economics on the CMA's Draft Guidance for the UK's Digital Markets Competition Regime

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I. Introduction: Some Guiding Principles for Reasonable Enforcement of Digital Competition Regulation

We thank the Competition and Markets Authority (CMA) for this invitation to comment on its draft guidance for the digital-markets competition regime.[1] The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan global research and policy center founded with the goal of building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public-policy debates and has longstanding expertise in the evaluation of competition law and policy. ICLE's interest is to ensure that competition law remains grounded in clear rules, established precedent, a record of evidence, and sound economic analysis.

Reasonable people may disagree about their merits, but digital competition regulations are now the law of the land in many jurisdictions, including the UK. Policymakers in those jurisdictions will thus need to successfully navigate heretofore uncharted territory in order to implement these regulations.

Most digital competition regulations, including the Digital Markets, Competition and Consumers (DMCC) Act, give competition authorities new and far-reaching powers. Ultimately, this affords them far greater discretion to shape digital markets according to what they perceive to be consumers' best interests. But as a famous pop-culture quote has it, "with great power comes great responsibility".[2]

The CMA's acquisition of vast new powers does not mean it should wield them indiscriminately. Because these new powers are so broad, they also have the potential to deteriorate market conditions for consumers. Thus, the CMA and other enforcers should consider carefully how best to deploy their newfound prerogatives. Enforcers will need time to identify those enforcement practices that yield the best outcomes for consumers. While this will undoubtedly be an iterative process, some overarching regulatory and enforcement principles appear to us to be essential:

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[1] *Consultation on Digital Markets Competition Regime Guidance*, COMPETITION AND MARKETS AUTHORITY (24 May 2024), https://www.gov.uk/government/consultations/consultation-on-digital-markets-competition-regime-guidance.

[2] SPIDER-MAN (Sony Pictures 2002).

1. **Prioritize consumer welfare**: Measure success by assessing outcomes for consumers, including price, quality, and innovation;

2. **Establish clear metrics and conduct regular assessments**: Design specific, measurable indicators of success, and evaluate outcomes frequently to ensure implementation remains effective and relevant;

3. **Respect platform autonomy**: Ensure that firms remain the primary designers of their platforms;

4. **Implement robust procedural safeguards and evidentiary standards**: Minimize unintended consequences through sound legal processes and evidence-based decision-making;

5. **Foster innovation and technological progress**: Ensure regulations do not stifle innovation, but rather encourage it across the digital ecosystem.

In many respects, the draft guidance already incorporates elements of these principles, and the CMA is to be commended for its thoughtful approach. We discuss these principles in greater detail below, followed by a discussion of areas where the guidance can and should be made to better reflect this approach.

A. Prioritize Consumer Welfare

Consumers' well-being should be the metric by which digital competition enforcement and compliance are ultimately assessed. As the CMA's Prioritisation Principles proclaim: "The CMA has a statutory duty to 'promote competition, both within and outside the UK, for the benefit of consumers.'"[3] It is thus essential that DMCC enforcement ultimately benefits, rather than harms, consumers. In this respect, it will be crucial for the CMA to distinguish conduct that "harms" competitors, because a rival brings superior products to the market, from conduct that harms consumers by distorting competition and foreclosing rivals. Preventing the former would penalize

[3] CMA *Prioritisation Principles*, COMPETITION AND MARKETS AUTHORITY (Oct. 30, 2023), https://www.gov.uk/government/publications/cma-prioritisation-principles/cma-prioritisation-principles. *See also*, *The Government's Strategic Steer to the Competition and Markets Authority*, DEP'T FOR BUSINESS & TRADE POLICY PAPER (Jul. 18, 2019), https://www.gov.uk/government/publications/governments-strategic-steer-to-the-competition-and-markets-authority-cma/governments-strategic-steer-to-the-competition-and-markets-authority ("The CMA has a key role in helping consumers and benefiting the wider economy.").

consumers by forcing strategic market status (SMS) firms to degrade their products and by dampening their incentives to continue to improve them.

As we explain throughout our comments, some simple procedural and substantive guardrails could ensure that enforcement ultimately delivers the goods for consumers. For example, the CMA's guidance should make clear that potential SMS firms are allowed to make the case that increases in size, scope, or popularity are due to competition on the merits, rather than a chronic and entrenched position of market power. By the same token, the CMA should be required to show some degree of causation between consumer harm and potential SMS firms' insulation from competition.

Favoring light-touch remedies over more intrusive alternatives would reduce the risk that DMCC enforcement leads firms to degrade their platforms in order to comply with its provisions. Other principles that would help to ensure the DMCC remains committed to consumer welfare include granting SMS firms freedom to decide how to achieve outcomes mandated by the conduct requirements, thus leveraging their expertise and know-how, and allowing sufficient time for the effects of remedies to become palpable.

B. Establish Clear Metrics and Conduct Regular Assessments

A second important point is that the deployment of new regulation is a discovery process.[4] Regulators (including the CMA) ought to require multiple iterations—learning from each as they proceed—in order to craft optimal rules. Indeed, despite some similarities with competition law, the DMCC largely rests on untested rules and procedures. This is not inherently bad or good, but it does increase the scope for enforcement errors that could harm stakeholders, including consumers and small businesses. These errors can largely be avoided by defining clear metrics for success, repeatedly assessing whether they are met, and learning from identified successes and/or failures to improve the legal regime in the future. In short, DMCC enforcement should be dynamic, with repeated reassessments of its effectiveness.

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[4] Justin G. Hurwitz & Geoffrey A. Manne, *Pigou's Plumber (or Regulation as a Discovery Process)*, SSRN (15 Mar. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4721112.

While there is some evidence in the CMA's draft digital-markets competition regime guidance[5] that these issues are at the forefront of its thinking, there is scope to incorporate more positive feedback loops into the DMCC's implementation. This includes establishing clear metrics for success; creating processes—such as regulatory sandboxes, experiments, and structured regulation[6]—to test rules, and to identify and impute potential failures; as well as defining procedures that enable the CMA to act on previously unavailable information and change its regulatory stance accordingly.

A look at the European experience with the DMA may prove enlightening in this respect. At the time of writing, European users still cannot directly click on Google Maps locations from the Google search-engine results page.[7] In a perfect world, regulations like the DMCC need to identify such failures (ideally before the rules are rolled out to hundreds of millions of users), and then determine whether they are inherent in the legal regime or whether they amount to noncompliance by firms. Depending on the answer, this may lead the regulator either to open noncompliance proceedings (if firms are to blame) or to rethink implementation (if degraded service is a direct consequence of the rule). This is much easier said than done. But creating processes that facilitate such assessments, and using them to improve rules going forward, is essential to maximize positive outcomes for consumers.

C. Respect Platform Autonomy

A third guiding principle is that SMS firms, rather than regulators or (even moreso) competitors, should remain the platforms' central designers. The basic issue is that it is the platforms themselves whose incentives are the most (though not perfectly) aligned with consumers. Indeed, direct competitors will generally stand to benefit if a platform becomes highly degraded, as this may cause consumers to switch platforms. Similarly, while regulators do not benefit from degrading the services of an SMS firm, they are unlikely to suffer severe repercussions if it occurs.

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[5] *Draft Digital Markets Competition Regime Guidance*, COMPETITION AND MARKETS AUTHORITY (2024), *available at* https://assets.publishing.service.gov.uk/media/6650a56d8f90ef31c23ebaa6/Digital_markets_competition_regime_guidance.pdf (hereinafter "Draft Guidance").

[6] *See* Hurwitz & Manne, *supra* note 4, at 34-35.

[7] *See* Dirk Auer, *The Future of the DMA: Judge Dredd or Juror 8?*, TRUTH ON THE MARKET (8 Apr. 2024), https://truthonthemarket.com/2024/04/08/the-future-of-the-dma-judge-dredd-or-juror-8.

The same does not hold for platforms. To a first approximation, where consumers are dissatisfied, even a monopoly platform may suffer significant losses. Consumers may switch platforms or reduce their time on the platform, which harms the firm's bottom line and gives it an incentive to avoid offering a degraded service.

In short, platforms have better—though certainly not perfect—incentives than anyone else to design services that are optimal for users. This does not mean other stakeholders shouldn't have any input into the scope and shape remedies and how they are rolled out, but rather that key platform-design decisions should ultimately reside with a platform's owner.

In practice, this behooves policymakers, including the CMA, to exhibit some deference toward platforms' product-design philosophy and key product differentiators. For instance, if a platform has built its success on features like a frictionless user interface or data security, then enforcers should favor remedies that preserve these key differentiators, even if this might entail less than optimal competition at the margin. This is simply a recognition that, if a platform has become highly successful by offering certain features to users, there is a high likelihood that users value them, and enforcers should thus attempt to preserve them.

In other words, there may be tradeoffs between increasing competition (or contestability) and certain platform features. The optimal balance is unlikely to be one where no weight is given to platform features.

D. Implement Robust Procedural Safeguards and Evidentiary Standards

Fourth, enforcers should bear in mind the maxim: "first, do no harm". Indeed, while unintended consequences are largely unavoidable when intervening in complex systems like digital-platform markets, some procedural and evidentiary safeguards can minimize these undesired consequences. In general, these safeguards should guarantee (i) that enforcers intervene only when necessary, and (ii) that, when interventions occur, they are as surgical as possible.

In practice, this means the CMA should ensure that DMCC remedies do not degrade the usability of online services—as has arguably been the case in the EU under the

Digital Markets Act (DMA).[8] Among the ways this be achieved is by granting firms the time (in terms of compliance deadlines) and flexibility (by testing multiple iterations of remedies) to roll out effective remedies. Similarly, there is a sense the CMA should favor simple remedies which only affect one part of an online platform, rather than more complex remedy packages that could have wider-reaching unintended consequences.[9] A corollary is that enforcement actions are only appropriate when enforcers have a clear sense that remedies would enable markets to function better than the status quo.

In general, enforcers should also be open to the notion that DMCC enforcement could have potentially unintended and undesirable effects on consumers.[10] After all, other digital market regulations—notably, the EU's General Data Protection Regulation (GDPR)—have been shown to harm innovation and competition.[11] There is no reason to assume the DMCC could not suffer from similar issues if enforcers are not cautious.

Finally, enforcers should intervene only when there is a clear sense that the market is not sufficiently disciplining SMS firms; this, in turn, implies that services should only be designated when there is clear evidence that competition is failing, and that a platform has significant market power. This is why, as explained in Section II.A, it is advisable not to dispense with the definition of relevant markets while enforcing

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[8] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828, 2022 O.J. (L 265) 1 (hereinafter "'DMA"').

[9] This is explained in more detail in Section IV on pro-competition interventions.

[10] Margrethe Vestager, *A Whack-A-Mole Approach to Big Tech Won't Do, Says Europe's Antitrust Chief*, THE ECONOMIST (4 Jun. 2024), https://www.economist.com/by-invitation/2024/06/04/a-whack-a-mole-approach-to-big-tech-wont-do-says-europes-antitrust-chief ("Some argue that opening up involves trade-offs. It does not have to. Asking platforms to open up their ecosystems, for instance, does not mean they have to compromise the security of their service. Technology can deliver an open and safe digital environment, if there is the will and sufficient investment to make that happen. Compliance with the DMA can be achieved without undermining users' rights to safety and privacy."); Foo Yun Chee, *Exclusive: EU's Vestager Warns About Apple, Meta Fees, Disparaging Rival Products*, REUTERS (19 Mar. 2024), https://www.reuters.com/technology/eus-vestager-warns-about-apple-meta-fees-disparaging-rival-products-2024-03-19.

[11] *See, e.g.*, Jian Jia, Ginger Zhe Jin &Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment*, 40 MARKETING SCI. (2021); Garrett Johnson, *Economic Research on Privacy Regulation: Lessons From the GDPR and Beyond, in* THE ECONOMICS OF PRIVACY (Avi Goldfarb & Catherine Tucker eds., 2024); *See also* Michal Gal & Oshrit Aviv, *The Competitive Effects of the GDPR*, 16 J. COMP. L. & ECON. 349 (2020).

the DMCC, and to have in place a procedure that ensures the best assessment possible of market power. This is a "filter" that would allow the CMA to make efficient use of its resources and reduce both the administrative and error costs of the DMCC, benefitting not only those firms offering digital services and products, but also consumers and society overall.

E. Foster Innovation and Technological Progress

Finally, we have not reached the end of digital history. Online platform markets, including those services designated under the DMCC, could (and likely will) continue to evolve and improve dramatically over the coming decades. This is likely to be especially true as generative-AI technology continues to augment these services.

Ensuring this innovation continues requires that enforcers preserve firms' incentives to invest in their services. These incentives may sometimes be enhanced by boosting competition, but they also depend on firms (even designated services) being able to earn risk-adjusted returns on their investments.[12] Enforcers should thus be particularly vigilant that DMCC enforcement does not expropriate designated firms, or else their incentives to continue innovating may be severely diminished (and these weakened incentives may have a knock-on effect on rivals' efforts if innovation is seen as a strategic complement). The upshot is that, pushed to their limits, mandated competition and transfers of rents away from gatekeepers could have dramatic effects on the innovative output of some of the world's leading innovators.

As we explain throughout the rest of our comments, some simple changes to the current guidance could bring DMCC enforcement further in line with these guiding principles, thereby benefiting society as a whole.

Legitimate concerns were raised when the DMCC (and other digital competition regulation) was passed into law. Indeed, if executed poorly, these regulations have

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[12] *See* Dirk Auer, *Innovation Defenses and Competition Laws: The Case for Market Power* 18 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4667754 ("There is thus a constant tension between antitrust enforcement and the promotion of innovation. And it is this tension which the dissertation seeks to explore. This task is complicated by the fact that the *ex ante/ex post* tradeoff is mostly intangible. It will generally be the case that no single innovation can be traced back to antitrust authorities' restraint, nor can a single antitrust intervention easily be associated with reduced innovation. Just like people trying to respect their new year's resolutions (lose weight, read more, etc.), no single departure is likely to be of pivotal importance. But a slew of small deviations will add up and may ultimately scupper authorities long term plans to bolster firms' incentives.").

the potential to significantly degrade consumers' online experience, with little to no benefits to competition.[13] This is arguably what has occurred in the European Union under the DMA. That these regulations are now the law of the land should not obscure such challenges. Instead, these early warning signs suggest it is essential to fine-tune guidance and other policy documents that will drive enforcement of these regulations.

The remainder of these comments proceeds as follows. Section II discusses how strategic market status is assessed under the CMA's draft guidance. Section III discusses the guidance on conduct requirements. Section IV discusses pro-competition intervention.

II. Strategic Market Status Definition Should Be Based on Solid Economic Evidence and Ensure an Efficient Use of the CMA's Resources

A platform's designation as an SMS firm is the first step toward application of the DMCC. Hence, this section of the guidance is of utmost importance to provide economic agents with certainty in designing their business models, contracts, and strategies.

The DMCC sensibly contemplates that a digital-services provider should have "substantial and entrenched market power" and "a position of strategic significance in respect of the digital activity" to be designated as an SMS firm.[14] This is appropriate,

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[13] Dirk Auer, Matthew Lesh, & Lazar Radic, *Digital Overload: How the Digital Markets, Competition and Consumers Bill's Sweeping New Powers Threaten Britain's Economy*, 4 IEA PERSPECTIVES (Sep. 2023), *available at* https://laweconcenter.org/wp-content/uploads/2023/09/Perspectives_4_Digital-overload_web-1.pdf.

[14] Regarding market power, Section 2.40 of the Guidance states that: "Market power arises where a firm faces limited competitive pressure and individual consumers and businesses have limited alternatives to its product or service or, even if they have good ones, they face barriers to shopping around and switching. Therefore, an assessment of market power is largely an assessment of the available alternatives and the extent to which they are substitutable for that product or service. This includes alternatives available in the present and possibilities for entry and expansion." It is important that the section mentions "possibilities for entry and expansion", but the text should be amended to clarify that alternatives should be "reasonable substitutes" and not identical substitutes, with every feature of the product or service offered by the firm whose market power is being assessed.

because only a firm with substantial market power would be able to impose the kind of harms that are generally relevant to competition law.[15]

Of course, the DMCC also has broader objectives, such as the fair-dealing objective, the open-choices objective, and the trust and transparency objective. But even in those scenarios, a firm without substantial market power would most likely not have incentive to treat its customers and business users "unfairly".

This "filter" also channels the efficient use of the CMA's resources. Without a requirement of some substantial degree of market power, competition agencies would pursue cases that are not necessarily worth the effort, as the number of citizens or businesses harmed by the alleged anticompetitive or unfair practice would be irrelevant. This would engender many more "false positives" and an over-deterrence effect on economic agents.[16] As Petit and Radic explain, the market-power requirement also filters out claims that would entail mere transfers of surplus, rather than real harms to the competitive process.[17]

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[15] Hay, for instance, describes the concept of market power as a "filter" or "screen" in antitrust cases. "If we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers." *See* George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 808 (1991).

[16] *See, e.g.*, Geoffrey A. Manne, *Error Costs in Digital Markets*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 103 (Joshua D. Wright & Douglas H. Ginsburg eds., Nov. 11, 2020), https://gaidigitalreport.com ("Market definition is similarly employed as a function of error-cost minimization. One of its primary functions is to decrease administrative costs: analysis of total effects of a proposed conduct would be inordinately expensive or impossible without reducing the scope of analysis. Market definition defines the geographic and product areas most likely to be affected by challenged conduct, sacrificing a degree of analytical accuracy for the sake of tractability.").

[17] *See* Nicolas Petit & Lazar Radic, *The Necessity of a Consumer Welfare Standard in Antitrust Analysis*, PROMARKET (18 Dec. 2023), https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis ("In general, excessive prices, discriminatory conduct, or unfair trading conditions reflect transaction or mobility costs that can coexist with free and open competition for entry. They only very faintly and ambiguously suggest harm to competition. In such cases, a market power requirement will filter out mere surplus transfers reflecting asymmetries in bargaining power or insignificant distortions in the level playing field, both of which represent the essence of the competitive process in all but name. Without a market power filter, abusive conduct cases blur the line between protecting competition and protecting competitors, since competition by definition consists in putting competitors at a disadvantage and, ultimately, in facilitating their exit from the market.").

The guidance then (S.2.42) specifies that: "The mere holding of market power is not in itself sufficient for an undertaking to meet the first SMS condition which requires that market power is 'substantial' and 'entrenched'," and that "'Substantial' and 'entrenched' are distinct elements and each needs to be demonstrated." This is an important distinction, as any firm may have *some* market power. As Landes and Posner explained in their seminal article "Market Power in Antitrust Cases":

> [M]arket power must be distinguished from the amount of market power. **When the deviation of price from marginal cost is trivial, or simply reflects certain fixed costs, there is no occasion for antitrust concern**, even though the firm has market power in our sense of the term.[18]

The guidance then further clarifies, however, that the terms "substantial [and] entrenched … are not entirely separate as the assessment of each will typically draw on a common set of evidence on market power". While it is fair to assert that the magnitude of market power (substantial or not) and its level of resiliency (entrenched or not) would have to be assessed using similar evidence, the fact that the drafters of the DMCC deliberately chose to include those words in S. 5.20, and connect them with the word "and" cannot be ignored.

Along those lines, the guidance should establish what it means for market power to be "entrenched". In turn, this word should mean something different than "substantial", as it should add some meaning to the Section. The concept is not defined in the case law or codified by the United Kingdom, the EU, or the United States. Both the "Online Platforms and Digital Advertising Market Study Final Report"[19] (at 21) and the "Furman Report"[20] (at 75), however, use the term "entrenched market power" to mean "difficult to remove". The former, for instance, states that:

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[18] Richard A. Posner & William M. Landes, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1980) (emphasis added).

[19] *Online Platforms and Digital Advertising Market Study Final Report*, COMPETITION AND MARKETS AUTHORITY (1 Jul. 2020), available at https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

[20] Jason Furman, *et al.*, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (Mar. 2019), *available at* https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf.

> Google and Facebook have such entrenched market power as a result of these **self-reinforcing entry barriers**, that we have concluded that the CMA's current tools, which allow us to enforce against individual practices and concerns, are not sufficient to protect competition. Further, the markets we have reviewed are fast-moving, and the issues arising within them are wideranging, complex and rapidly evolving. Tackling such issues requires an ongoing focus, and the ability to monitor and amend interventions as required.[21]

While these comments do not endorse the findings or conclusions of the abovementioned reports, the CMA may consider them as guidance to define the term "entrenched" and to specify which kind of evidence may be used to substantiate it. Following the logic of said reports, "entrenched" should mean a high degree of market power, which is not only "substantial", but also hard to dispute. Therefore, the assessment of such quality should involve some long-term evidence of rivals not entering the market (because, for instance, of the existence of regulatory barriers to entry) or at least of a dominant firm with very stable market shares (because entrants can only compete on a small competitive fringe). A recent background note by the Organization for Economic Co-operation and Development (OECD), for instance, acknowledges that "(a)n entrenched market position therefore implies a degree of durability in a dominant position and resistance to changes".[22]

Therefore, Section 2.52 of the guidance should be revised or eliminated. The section establishes that "where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched", establishing a relative presumption, rebuttable with "clear and convincing evidence" that such market power is likely to dissipate. As has been explained in the paragraphs above, the word "entrenched" should add some meaning to the section. The term "entrenched market power" cannot be reasonably construed as being generally the same as "market power".

The guidance establishes (S.2.43) that "...assessing substantial and entrenched market power does not require the CMA to undertake a formal market definition exercise which often involves drawing arbitrary bright lines indicating which products are

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[21] CMA, *supra* note 19, at 75 (emphasis added).

[22] *Moat Building and Entrenchment Strategies*, OECD BACKGROUND NOTE (11 Jun. 2004) at 8, *available at* https://one.oecd.org/document/DAF/COMP/WP3(2024)1/en/pdf.

'in' and which products are 'out'." It would be wise, however, not to disregard the relevant market definition when analyzing the existence of substantial and entrenched market power. While contemporary economists may be open to dispensing with the definition of relevant markets where it is possible to directly infer market power,[23] market definition is helpful not only to measure market power, but also to better identify the competitive process being harmed.[24] As Manne explains:

> Particularly where novel conduct or novel markets are involved and thus the relevant economic relationships are poorly understood, market definition is crucial to determine "what the nature of [the relevant] products is, how they are priced and on what terms they are sold, what levers [a firm] can use to increase its profits, and what competitive constraints affect its ability to do so." In this way market definition not only helps to economize on administrative costs (by cabining the scope of inquiry), it also helps to improve the understanding of the conduct in question and its consequences.[25]

Of course, as the same author warns, it is very important, especially in the case of digital markets, not to define relevant markets too narrowly by looking only to past competition in a static way:

> Market definition is inherently retrospective—systematically minimizing where competition is going, and locking even fast-evolving digital competitors into the past. Traditional market definition analysis that infers future substitution possibilities from existing or past market conditions will systematically lead to overly narrow markets and an increased likelihood of erroneous market power determinations. This is the problem of viewing Google as a "search engine" and Amazon as an "online retailer," for example, and excluding each from the other's market. In reality, of course, both are competing for scarce user attention (and advertising dollars) in digital environments; the specific functionality they employ in order to do so is a red herring. As such (and as is apparent to virtually everyone but antitrust enforcers and advocates of increased antitrust

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[23] *See, e.g.,* Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361 (2013).

[24] Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 741 (2013).

[25] Manne, *Error Costs, supra* note 16, at 48.

> intervention) they invest significantly in new technology, product designs, and business models because of competitive pressures from each other…
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> Relatively static market definitions may lead systematically to the erroneous identification of such innovation (or other procompetitive conduct) as anticompetitive. And the benefits of innovation aimed at competing with rivals outside an improperly narrow market, or procompetitive effects conferred on users elsewhere on the platform or in another market, will be relatively, if not completely, neglected.[26]

The guidance takes the abovementioned into account in Sections 2.47 and 2.48:

> 2.47 The CMA's starting point will be market conditions and market power at the time of the SMS investigation. From that starting position, the CMA will consider the potential dynamics of competition over the next five years, taking into account any expected or foreseeable developments that may affect the firm's conduct in respect of the digital activity if the firm was not to be designated.
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> 2.48 As with any ex ante assessment, there will necessarily be some uncertainty as to the future evolution of a sector. However, such uncertainty does not preclude the CMA from finding substantial and entrenched market power based on the evidence available to it when making its assessment. If post designation developments or new evidence indicate that a firm's market power has – contrary to the CMA's expectations in its initial assessment been significantly diminished, the CMA is able to revisit its previous assessment and can consider whether to revoke the SMS designation."

It is commendable that the guidelines contemplate procedures to continue or revoke an SMS designation and specify that the CMA would undertake ongoing monitoring and early reassessment of relevant digital markets, considering the submissions from economic agents. This is a good practice or regulatory governance, considering the abovementioned dynamism of digital markets.

At this point, it is relevant to mention that the market definition—or, in any case, the substitutability analysis conducted by the CMA—should consider the possible substitution of a digital product or service from *offline markets*. While market definition

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[26] *Id.* at 104-05.

often involves discussion of specific uses or specific features of a product or service, substitutability should be measured in light of customers' inclination to switch to other producers of the same product or services, or even to other products after the introduction of "small but significant and non-transitory increase in price".[27] Irrespective of the product's nature, if customers switch, there is an alternative to the hypothetic monopolist's product that disciplines any potential exercise of market power.

There is evidence, for instance, that Amazon has faced robust competition from retail stores like Walmart.[28] In Mexico, for instance, there is empirical evidence that Amazon not only competes, but competes intensively with other distribution channels and has a net-positive welfare effect on Mexican consumers. A 2022 paper found that "e-commerce and brick-and-mortar retailers in Mexico operate in a single, highly competitive retail market"; and that "Amazon's entry has generated a significant pro-competitive effect by reducing brick-and-mortar retail prices and increasing product selection for Mexican consumers".[29]

The guidance clarifies in Section 2.45 that:

> Substantial and entrenched market power is a distinct legal concept from that of 'dominance' used in competition law enforcement cases, reflecting the fact that the digital markets competition regime is a new framework with a different purpose. As a result, the CMA will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment.

This wording suggests that the CMA could set a lower standard than that required to infer dominance in the application of competition law. While the DMCC has a different purpose than the Competition Act of 1998 and the Enterprise Act of 2002, it cannot ignored that the DMCC is concerned with the regulation of *competition* in

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[27] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (8th Ed., 2015) at 31-32.

[28] Jonathan Barnett, *Does the European Union's Digital Markets Act Provide an Appropriate Model for Maintaining Competition in California's Innovation Economy?,* Report Submitted to the California Law Revision Commission (Jan. 2024) at 17, *available at* http://www.clrc.ca.gov/pub/2024/MM24-05.pdf.

[29] Raymundo Campos, Alejandro Castañeda, Aurora Ramírez & Carlos Ruiz, *Amazon's Effect on Prices: The Case of Mexico*, Centro de Estudios Economicos Working Paper No. II-2022 (2022), *available at* https://cee.colmex.mx/dts/2022/DT-2022-2.pdf.

digital markets,[30] and that it confers power to the CMA "to promote competition where it considers that activities of a designated undertaking are having an adverse effect on competition".[31] Moreover, by using terms like "market power" (that in turn has to be "substantial"), the DMCC's text allows us to infer that the bar should be set, at least, at "dominance" (if not higher, if we consider that the market power should be "entrenched").

The DMCC, in other words, speaks the language of competition law, and competition law tends to equate the concept of dominance with "*substantial* market power". As Whish explains:

> Paragraph 65 of the Court's judgment in United Brands can be understood to **equate dominance with the economist's definition of substantial market power**; the Commission does so in paragraph 10 of its Guidance on Article 102 Enforcement Priorities where it says that the notion of independence referred to by the Court is related to the degree of competitive constraint exerted on the undertaking under investigation. Where competitive constraints are ineffective, the undertaking in question enjoys 'substantial market power over a period of time; the Guidance says that an undertaking has substantial market power if it is 'capable of profitably increasing prices above the competitive level for a significant period of time.[32] (emphasis added).

The 2004 Office of Fair Trading Guidelines on Abuse of a Dominant Position, in the same vein, states that "(a)n undertaking will not be dominant unless it has substantial market power".[33]

Market power must be assessed case-by-case. Therefore, it is only reasonable that the CMA shouldn't be constrained by past specific findings of dominance (or findings that there was no dominance). Still, there is no reason to disregard the criteria applied in competition caselaw to assess the dominance of a given economic agent.

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[30] DMCC, S.1, (1), (a).

[31] DMCC, S.1, (4).

[32] WHISH AND BAILEY, *supra* note 27, at 190.

[33] *Abuse of a Dominant Position: Understanding Competition Law*, OFFICE OF FAIR TRADING (2004) at 13, *available at* https://assets.publishing.service.gov.uk/media/5a74c497ed915d4d83b5ecd7/oft402.pdf.

Such criteria would bring consistency to the CMA's actions, more predictability to economic agents, and, therefore, more legitimacy to the DMCC.

The guidance also deals with the concept of "a position of strategic significance" of an SMS firm. In that regard, it follows to a great extent the definitions included in the DMCC, establishing that a firm has strategic significance if it has "achieved a position of significant size or scale in respect of the digital activity" and "(a) significant number of other firms use the digital activity as carried out by the firm in carrying on their business".[34] It does not, however, offer clear guidance, as the following section establishes that "(t)here is no quantitative threshold for when size or scale of the potential SMS firm can be considered as significant, and this may be assessed in terms of the firm's absolute position and/or relative to other relevant firms".[35]

Like the concepts of "substantiality" and "entrenchment", the concept of "strategic significance" should mean something different and additional to "ordinary" market power. Otherwise, we can assume that the DMCC's drafters would not have included it in its Section 2. Several of the laws and regulations addressing digital markets target firms' size, scalability, or "strategic significance". But many investments, business practices, and innovations that benefit consumers—either immediately or over the long term—may also enhance a company's size, scale, or "strategic significance". Some of these are *possible* because of a company's size. In that vein, targeting size or conduct that bolsters market power, without any accompanying evidence of harm, creates a serious danger of broad inhibition of research, innovation, and investment—all to the detriment of consumers.

Finally, regarding the evidence considered to assess market power, the guidance (Section 2.49) mentions that it may include "a firm's internal documents, business forecasts, or industry reports". Later, paragraphs 2.63 to 2.67 below describe how the CMA may assess such evidence. These sections establish, in general, that the CMA does not have a prescriptive list of evidence, and that the standard of proof will be of the "balance of probabilities". This is correct and according to procedural good practices.

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[34] Sections 2.53-2.56.

[35] Section 2.57.

Furthermore, it is why the CMA should be cautious not to rely too heavily on internal business documents to prove anticompetitive behaviour or "dominance". As Manne and Williamson explain, business documents "are written by business people, for business purposes, and their translation from business to law (and economics) is frequently untenable".[36] Salespeople, for instance, have strong incentives to communicate to internal stakeholders their efforts to beat competitors and their results, often overstating them. These communications can be mistakenly construed as evidence of "anticompetitive conduct".

III. Conduct Requirements

Along with pro-competition interventions, discussed in the next section, the CMA's other primary tool to achieve the DMCC's goals of "fair dealing", "transparency", and "open choices" will be conduct requirements.[37] The guidance generally adopts a reasonable and balanced approach to such requirements, which suggests that the CMA is committed to achieving the DMCC's goals without unduly burdening SMS firms.

While the CMA should be commended for putting the interests of consumers first and acknowledging the possibility that conduct requirements might not always pan out as expected, the guidance does not always draw a sufficiently clear distinction between the interests of third parties and consumers. To avoid stifling procompetitive conduct, the guidance should explicitly acknowledge that these groups' interests may not always align. Where they conflict, consumers' interests must take precedence over those of business users—including, of course, competitors. This is important to ensure that the DMCC is used to bolster competition to the ultimate benefit of consumers, and not as a rent-seeking tool for self-interested third parties.

In addition to this overarching observation, we offer other thoughts on how to improve the guidance's conduct-requirement provisions. In particular, we think some key terms and concepts could use further clarification; that the CMA should be patient in evaluating measures taken by SMS firms to comply with conduct requirements; and that the CMA should be realistic about its ability to anticipate the effects

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[36] Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV., 609, 610 (2005).

[37] DMCC, S.19(5).

of complex conduct requirements and, in particular, the interaction of several conduct requirements applying simultaneously. We also appreciate the use of examples and encourage the CMA to provide more such examples when possible.

A primary challenge of *ex-ante* competition rules is the indeterminacy of some core concepts used to establish the need for prohibitions and obligations to address gatekeeper power. The CMA's guidance makes important inroads in the direction of much-needed clarity by demonstrating what inherently vague concepts, such as "fairness", mean in practice. Some key DMCC concepts, however, could benefit from further clarification. For instance, when will the CMA consider that market power has increased "materially"? (S.20(3)(C)). Does any increase in market power count toward satisfying the materiality criterion, or does the increase have to be of a certain magnitude? If so, how much? While a definitive answer likely cannot be given *a priori*, it would be useful for the CMA to offer more guidance on the factors that will be considered when assessing materiality. Some examples would also be useful to advance legal certainty.

The guidance generally recognizes the importance of protecting consumer welfare and preserving SMS firms' incentives to continue to innovate and reap the rewards of their business acumen, foresight, and innovation (See, *e.g.*, Points 3.7, 3.22 and 3.23). The guidance is also cognizant of the possibility of unintended consequences, which suggests that the CMA is realistic about the DMCC's potential to promote—but also potentially to distort—competition, if conduct requirements are poorly designed (see, for instance, Points 3.26 and 3,28). This is to be applauded, as no regulation is without risks and tradeoffs.[38]

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[38] In the context of the DMA, *see*, *e.g.*, Carmelo Cennamo & Juan Santaló, *Potential Risks and Unintended Effects of the New EU Digital Markets Act*, ESADE CTR. ECON. POL'Y. (Open Internet Governance Inst. Working Paper Series No. 4, 2023), *available at* https://www.esade.edu/ecpol/wp-content/uploads/2023/02/AAFF_EcPol-OIGI_PaperSeries_04_Potentialrisks_ENG_v5.pdf; *see also* Lazar Radic & Mario Zúñiga, *Comments of the International Center for Law & Economics, Ministry of Finance Public Consultation - Economic and Competitive Aspects of Digital Platforms*, INT'L CTR. L. & ECON., 2 (2024), *available at* https://laweconcenter.org/wp-content/uploads/2024/05/ICLE-Brazil-MoF-Consultation-on-Digital-Competition-1.pdf ("Ex-ante regulations like the European Union's Digital Markets Act (DMA) can have unintended consequences, such as stifling innovation, reducing consumer welfare, and increasing compliance costs. They can also lead to increased risks of regulatory capture and rent seeking, as the verdict on whether a gatekeeper has complied with the law often comes down to the degree to which rivals are satisfied. Of course, rivals have a clear personal stake in never being satisfied. By tethering

In keeping with this sound approach, the CMA should make clear that not every type of conduct that might strengthen a company's SMS justifies imposing conduct requirements. According to S.20(3)(C) DMCC:

> Carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, *or bolster the strategic significance of its position*, in relation to the relevant digital activity. (emphasis added).

As the DMCC indicates, strategic significance can arise from increased scale, size,[39] and popularity,[40] among other factors. Increased size, scale, and popularity can, however, also be the result of increased efficiency or superior products and services. In other words, companies, including those that render "digital activities" as defined by the DMCC,[41] can also gain size, scale and popularity by competing on the merits, not simply by thwarting competition. In a recent interview about competition reform, Aaron Wudrick, senior fellow and director of the Macdonald-Laurier Institute's Domestic Policy Program, noted thus:

> Say you have one competitor, in particular, offering lower prices, higher quality, or newer cutting-edge products, so they end up breaking from the pack. They gain customers, and their market share rises. So this higher concentration is actually signaling more, rather than less, competition![42]

Wudrick was advising against using concentration measures alone—as opposed to market power—as proxy for the level of competition in a given market. The DMCC does not dispense with the market-power requirement, which is generally a good

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intervention to a comparatively clear public-benefit standard—consumer welfare—competition laws minimize the potential for error costs and decrease the chances that the law will be coopted for private gain."); and Dirk Auer, *The Broken Promises of Europe's Digital Regulation*, TRUTH ON THE MKT. (12 Mar. 2024), https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation.

[39] DMCC, S.6(1)(a).

[40] DMCC, S.6(1)(b).

[41] DMCC, S.3.

[42] Aaaron Wudrick, *The View from Canada: A TOTM Q&A with Aaron Wudrick*, TRUTH ON THE MKT. (12 Jun. 2024), https://truthonthemarket.com/2024/06/12/the-view-from-canada-a-totm-qa-with-aaron-wudrick.

thing.[43] But like concentration, some measures of SMS status—such as size, scale, and popularity—could be equivocal or might point to vigorous competition, rather than the absence thereof.

Sound competition regulation should seek to encourage, not castigate, procompetitive conduct that rewards companies with size, scale, and popularity. Furthermore, so long as entry into the market is possible, size, scale and network effects can yield further procompetitive benefits, thus creating a virtuous cycle. It is therefore important for the guidance to draw a line in the sand between conduct that merely entrenches market power and conduct that increases sales or traffic as a result of competition on the merits—including competition along the consumer-valued dimensions of efficiency, quality, or convenience.

Just as in competition law, the primary criterion here should be whether a certain conduct has negative, neutral, or positive effects for consumers. Where increases in a firm's size, scale, or sales revenue (or traffic, as appropriate) are accompanied by cognizable consumer benefits (*e.g.*, lower prices, better quality, choice, or curation), the CMA should generally conclude that such growth is the result of competition on the merits. By contrast, an increase in a firm's size, scale, or sales that runs parallel to long-term depreciating consumer benefits would be a *prima-facie* indication that the company is using its position to entrench its market power, and that it may therefore be appropriately labelled an SMS firm. Where increases in scale, size, or popularity are not accompanied by any appreciable effects on consumers—positive or negative—the CMA should defer to consumer choice and to companies' freedom to experiment, reorganize, redesign and, in general, run their enterprise as they see fit.

In any case, the CMA should allow, and the guidance should make clear, that potential SMS firms are allowed to make the case that any increases in size, scope, or popularity are due to competition on the merits, rather than a chronic and entrenched position of market power. By the same token, the CMA should be required to show some degree of causation between consumer harm and a potential SMS firm's insulation from competition.

For instance, the CMA should be clear about when tying is procompetitive, such as when consumers benefit from increased convenience or when two products/services

[43] By contrast, the DMA does not require gatekeepers to have market power.

combine to create synergies are linked. The CMA should clarify how it will interpret S.20(3)(C), which not only prohibits SMS firms from requiring but also *incentivising* "users or potential users of one of the designated undertaking's products to use one or more of the undertaking's other products alongside services or digital content the provision of which is, or is comprised in, the relevant digital activity". Read literally, this would prohibit *any* combination of services that comprise one or several digital activities.

Consumers, however, often appreciate and benefit from integrated products and services—such as, *e.g.*, the seamless integration of Google Search and Google Maps. In fact, following the DMA's entry into force in the EU, many users have complained that they can no longer access Google Maps from Google.[44] Further, tying could reduce consumers' search costs and improve functionality by integrating complimentary products that work better together.[45] The guidance should clarify that the CMA does not intend to throw the proverbial baby out with the bathwater.

S.20(3)(c) allows the CMA to impose conduct requirements that capture non-designated digital activities for the purpose of preventing a material increase in the SMS firm's market power or strategic significance in relation to the designated digital activity. As Point 3.13 of the guidance explains:

> This would include requirements to prevent the SMS firm from carrying out non-designated activities in a way that is likely to reinforce or embed such market power and/or position of strategic significance.

As indicated in our comment on Point 3.7 of the guidance, however, strategic significance can also result from procompetitive conduct, such as improved efficiency, quality, or innovation. An expansive reading of S.20(3)(c) would prohibit conduct

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[44] Edith Hancock, *Severe Pain in the Butt: EU's Digital Competition Rules Make New Enemies on the Internet*, POLITICO (25 Mar. 2024), https://www.politico.eu/article/european-union-digital-markets-act-google-search-malicious-compliance.

[45] Andrew Mercado, *The Paradox of Choice Meets the Information Age*, TRUTH ON THE MKT. (19 Apr. 2022), https://truthonthemarket.com/2022/04/19/the-paradox-of-choice-meets-the-information-age; Kay Jebelli, *Confronting the DMA's Shaky Suppositions*, TRUTH ON THE MKT. (16 Apr. 2024), https://truthonthemarket.com/2024/04/16/confronting-the-dmas-shaky-suppositions; Dirk Auer & Lazar Radic, *What Have the Intermediaries Ever Done for Us*, CPI ANTITRUST CHRONICLE (Jun. 2022), *available at* https://laweconcenter.org/wp-content/uploads/2022/06/4-WHAT-HAVE-THE-INTERMEDIARIES-EVER-DONE-FOR-US-Dirk-Auer-Lazar-Radic.pdf.

on *any* market in which the SMS company is active that resulted in or was (according to the CMA) likely to result in an increase in size, scale, or popularity. We fear that this reading is not only overly broad, but risks capturing swathes of procompetitive conduct in markets that are not even covered by the DMCC.

The guidance could, at a minimum, give some sense of the sort of nondigital activities that could be affected by S.20(3)(c)—such as, *e.g.*, through non-exhaustive but illustrative examples (examples are given elsewhere such as, *e.g.*, Points 3.15, 3.14, or 3.8). We believe this is crucial for the sake of legal certainty, as well as to ensure that the DMCC's scope remains cabined within its natural and legally prescribed limits, thereby reducing the likelihood of regulatory overreach.

In general, the CMA should be clear that the DMCC's goal is to protect competition and consumers, not to help competitors. To a large extent, the guidance achieves this, and should be commended for doing so (see, *e.g.*, Point 3.10). In Point 3.22, the guidance states that:

> The factors that informed the CMA's decision to designate a firm as having SMS in respect of a relevant digital activity, including its size, market power, and strategic significance, will often be highly relevant in identifying issues that *could cause harm to businesses or consumers* which the CMA may wish to remedy, mitigate or prevent through the imposition of CRs. (emphasis added).

This might suggest that harms to businesses and to consumers are treated equally under the DMCC, which we strongly advise against (see our comments to Point 3.7 above). In the next point, however, the Guidance clarifies that "in considering what a [conduct requirement] or combination of CRs is intended to achieve, the CMA will have regard in particular to achieving benefits for *consumers*". This is the right approach, and a welcome clarification.

As indicated in our response to Point 3.7, however, the CMA should be clear that there may be times when the interests of competing businesses or business users are not equivalent to the interests of consumers. The guidance's indication that conduct requirements might benefit consumers either directly or indirectly by giving rise to benefits to businesses that are likely to be passed on to consumers should be tempered by acknowledging that some benefits might not be passed down to consumers at all and, more generally, that not everything that harms or benefits competitors will

necessarily have the same effect on consumers. This is important to ensure that the DMCC is used to benefit consumers, and not as a rent-seeking tool by self-interested (and, often, less-successful) businesses. We therefore suggest that the guidance explicitly incorporate examples of situations where certain behavior by SMS firms harms business users or competitors but benefits consumers (and *vice versa*).

It is good that, as in Point 3.26, the CMA is aware of the need to ensure consistency and coherence in designing and implementing conduct requirements, especially given the range of products and services that are encompassed under "digital activities". Indeed, the "digital activity" blanket term is misleading. "Digital activities" are anything but monolithic. They cover a range of products and services with little in common, except that they are provided via the internet and involve some sort of digital content.[46]

Furthermore, the companies that render such services are also vastly different. For example, some, like Amazon, are primarily logistics operators, while others, like Apple, are primarily hardware companies. In other words, given that SMS firms and their products are anything but homogenous, achieving coherent and consistent outcomes might require the CMA to impose different conduct requirements on different companies for the *same* digital activity.

Our (somewhat belated) point here is that the CMA should be commended for showing an awareness that achieving coherence and consistency under DMCC is an important, albeit complex, task. To ensure that coherence and consistency remain a top priority—in theory as well as in practice—the guidance could spend more time elaborating how the CMA intends to design conduct requirements such that different products, rendered by different companies, achieve the same goals.

The guidance states that, whenever possible, SMS firms will be free to decide how to achieve outcomes mandated by the conduct requirements (see, *e.g.*, Principle 1, 3). This is the correct approach, as it allows SMS firms sufficient flexibility to leverage their expertise and know-how in designing solutions that do not undermine the core benefits of their products and services, while allowing the CMA to monitor firms' alignment with the DMCC's goals. In a similar vein, it is also commendable that the CMA is willing to impose higher-level requirements before escalating "the

[46] DMCC, S.3.

enforcement pyramid" toward more stringent and detailed conduct requirements (Principle 4). The opposite approach would be unjustified, and more apt to lead to unintended consequences. It could also foster ill will and distrust between the regulator and the regulated companies, which could negatively affect the DMCC's effectiveness ove the long term.

With reference to Point 3.28, it is unclear what timescale the CMA will consider when assessing whether a conduct requirement or combination of conduct requirements is likely to be effective in achieving its intended aim or aims. To ensure legal certainty and compliance, however, the guidance should provide some sense of how soon the CMA expects a conduct requirement to start producing the desired results. Or, put differently, when will the CMA consider that a conduct requirement has succeeded or failed? Understandably, this may vary from case to case, but the CMA should at least provide general timescales, along with an explanation and, if possible, examples.

Our view is that, in establishing a timescale, the CMA should be patient and allow a reasonable period for the results of changes made pursuant to the conduct requirements to become palpable. For example, if the CMA requires an SMS company to allow third-party app stores on its operating system, it might take some time before consumers start using those alternative app stores. Thus, if the market shares of competing app stores do not immediately surge following the implementation of changes, the CMA should not be too quick to assume that the SMS firm has not complied with its obligations under the DMCC or has "complied maliciously".[47] It could be that consumers need more time to get acquainted with the new options, or that they ultimately prefer to stick with the first-party app store. It would be useful to underscore this patience in the guidance, as it would provide clarity to SMS firms and help manage the expectations of business users.

On a separate note, the CMA should be commended for considering effects on consumers and taking into account the risk of unintended consequences when assessing whether a conduct requirement would be effective in achieving its aims. As we have argued throughout these comments, the CMA should ensure that it does not lose

[47] A term popular among critics of gatekeepers' compliance efforts with the DMA. *See, e.g.,* Andy Yen, *Apple's DMA Compliance Plan Is a Trap and a Slap in the Face for the European Commission,* PROTON BLOG (5 Feb. 2024), https://proton.me/blog/apple-dma-compliance-plan-trap.

sight of the DMCC regime's effects on consumers and that it remain vigilant to the possibility of unintended consequences with every intervention.

In Point 3.29, the guidance states that the CMA will seek to ensure that a conduct requirement or combination of conduct requirements is coherent with conduct requirements imposed on the same or different SMS firms. It also states that the CMA may consider, as appropriate, coherence with other interventions imposed elsewhere within the scope of the authority's powers. Ensuring coherence generally signals the right approach, but it is easier said than done (see also our comments on Point 3.26).

Conduct requirements are likely to involve complex product-design changes. They are also, by definition, forward-looking, requiring the CMA to anticipate likely outcomes from the confluence of multiple codependent factors. To minimize unintended consequences and error costs, the CMA should start with simpler, individual conduct requirements, rather than complex, combined conduct requirements. During the early stages of the DMCC, in particular, it is risky to start with combinations of conduct requirements, as such requirements might behave differently together than they do individually.

Furthermore, individual conduct requirements make it easier to observe the relationship between the independent variable (the conduct requirement) and the dependent variable (the market outcome sought). Only once the CMA has significant experience with individual conduct requirements should it start tinkering with combinations. Obviously, some combinations of conduct requirements (such as, *e.g.*, conduct requirements aimed at different SMS firms rendering the same digital activity) are inevitable, but we do not advise the CMA to be overly ambitious until it has developed substantial expertise. A commitment to this piecemeal and cautious approach could perhaps be incorporated into the guidance.

When assessing the proportionality of conduct requirements, the guidance does well to consider the likely positive and negative effects on SMS firms (Point 3.30). The DMCC should not seek to punish SMS firms or undercut their incentives to keep investing in products and services. It is important that conduct requirements do not disproportionately encumber SMS firms or impose unnecessary requirements.

When gathering information before imposing a conduct requirement, the guidance states that the CMA will consider information from a range of sources, including responses to invitations to comment, market-monitoring mechanisms, or market

studies (Point 3.38). This is good: the CMA should not overly rely on information and complaints submitted by business users and third parties (especially competitors), who may have vested interests that do not align with those of consumers or the DMCC's public-interest objectives. Moreover, as some have pointed out, business users face a "Stalter and Waldorf problem", as they have an interest in never being satisfied and always seeking to extract more concessions from the regulated companies.[48]

Generally, the CMA should be commended for its willingness to give SMS firms flexibility in responding to conduct requirements, even in ways that differ from its interpretative note (see, for example, Point 3.55). In doing so, the guidance recognizes that there may be more than one valid way to interpret a conduct requirement.

We also salute the fact that the guidance displays a willingness to grant SMS firms sufficient time to implement the necessary technical or business changes (see Points 3.61-62). As noted throughout these comments, redesigning products or business practices is costly and time-consuming, and the CMA does well to manage expectations regarding how quickly these things can be achieved.

Furthermore, the CMA displays a generally cordial disposition to SMS firms, rather than an antagonistic one. In a future where the CMA is likely to interact repeatedly and work closely with SMS firms, fostering goodwill and trust between the regulator and the regulated is crucial.

IV. Pro-Competition Interventions

Section 44 of DMCC grants the CMA powers to make pro-competitive interventions (PCI or PCIs, in plural). How the CMA deploys these powers will be one of the factors that most determine whether the DMCC achieves its ambitions. The DMCC bill affords the CMA great discretion to design and enforce PCIs, making them something of a double-edged sword. In the best-case scenario, PCIs could be used to swiftly obtain light-touch remedies from SMS firms, while benefiting consumers and other stakeholders. On the other hand, if used heavy-handedly, PCIs have the potential to degrade online platforms, while dragging the CMA into lengthy legal disputes. In

[48] Adam Kovacevich, *The Digital Markets Act's "Statler & Waldorf" Problem*, CHAMBER OF PROGRESS (7 Mar. 2024), https://medium.com/chamber-of-progress/the-digital-markets-acts-statler-waldorf-problem-2c9b6786bb55.

other words, PCIs' greatest potential lies in their use as a surgical tool, not a sledge-hammer.

The CMA's guidance conveys reassuring signals that it will seek to use PCIs even-handedly. For instance, Article 4.12 of the guidance lists a series of indicators the CMA will consider when determining whether a practice has an adverse effect on competition (AEC).[49] To some extent, this mimics the sort of fact-intensive inquiry that firms have come to expect under competition rules. The CMA's commitment to account for potential efficiencies when investigating potential AECs is also highly commendable.[50]

In that vein, a good additional procedural safeguard to include in the guidance would be to make at least a preliminary assessment of the PCI before initiating any CR procedure. If a competition agency does not have a very good idea how to implement a remedy that would allow the market to function reasonably, and better than the *status quo*, then it probably is not a good use of resources to initiate a procedure that may affect business models and practices that we know benefit consumers.[51]

Another positive note concerns the CMA's acknowledgement that PCIs can fail. According to the guidance, this can happen when a PCI fails to increase competition

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[49] Draft Guidance, Section 4.12 ("4.12 Typically, however, the indicators that the CMA will consider may include (but are not limited to) whether: (a) SMS firms' profits reflect a reasonable rate of return based on the nature of competition; (b) the competitive positions of SMS firms and their rivals are based on the merits of their respective offerings; (c) SMS firms and their competitors flex parameters of competition in response to rivals and wider developments; (d) SMS firms' users and customers can make effective decisions between a range of alternatives and are able to switch between these; (e) SMS firms and their competitors are rewarded for operating efficiently, innovating and competing to supply the products that users and customers want; and/or (f) competitors and potential competitors to SMS firms face limited barriers to entry and expansion.")

[50] Draft Guidance, Section 4.13 ("When assessing whether a factor or combination of factors is having an AEC, the CMA will also consider in its assessment any competition-enhancing efficiencies that have resulted, or may be expected to result, from such factor(s).")

[51] Although written with antitrust litigation in mind, this passage from Herbert Hovenkamp is relevant to our point: "Every complex antitrust case must begin by considering the remedy. Anticipating the appropriate fix is like having an exit strategy in battle. Court injunctions that prohibit a specific behavior or action are easier to obtain, but they may also accomplish less. "Structural" relief, such as a breakup, requires proof of conduct that only a structural change can fix, as well as proof that the new structure will be better. The recent platform monopolization cases raise a recurring issue in antitrust law: creating the right remedy is often more difficult than establishing unlawful conduct." *See* Herbert Hovenkamp, *Fixing Platform Monopoly in the Google Search Case*, PROMARKET (6 Jun. 2023), https://www.promarket.org/2023/10/06/fixing-platform-monopoly-in-the-google-search-case.

in the intended way or, crucially, because the PCI degrades an SMS firm's platform to such an extent that consumers are left worse off than if no PCI had been imposed (the latter is an important recognition that other regulators often fail to acknowledge). Indeed, as the draft guidance explains:

> The CMA will have regard to a range of factors, including: (a) the PCI's likely impact on the AEC and, in addition, any detrimental effects, either already arising or expected to arise from it… (c) the risk of the PCI not meeting its intended purpose and/or giving rise to unintended consequences.[52]

The CMA's proposed PCI trial and testing of PCIs is, in that respect, a welcome addition. If carefully implemented, this should enable the authority to avoid some of the pitfalls that foreign enforcers, such as the European Commission, have encountered when attempting to enforce digital competition regulations. Following the entry into force of the DMA, gatekeepers have, for instance, been forced to degrade their platforms for European users—mostly because the DMA did not provide sufficient timeframes or legal sandboxes for gatekeepers to market test their compliance solutions.[53]

Despite these reassuring statements, there are several areas where we believe the CMA's guidance could be amended to provide further clarity to firms and better safeguards against the potential unintended effects of DMCC compliance.

For a start, while the CMA understandably wants to leave all remedial options on the table, some additional clarity concerning the respective roles of behavioral and structural remedies would be welcome. There is, indeed, a sense that structural remedies are far more invasive than behavioral ones; as the CMA notes, they will often amount to selling a highly successful line of business into which an SMS firm may have invested billions of pounds to create or acquire. Structural remedies may also be much harder to implement when an online platform's distinct services are built upon common infrastructure, such as code, that cannot be easily divided.

The guidance appears implicitly to recognize this much. Many of the procedural safeguards outlined in the CMA's draft guidance are, indeed, impossible to apply to

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[52] Draft Guidance, Section 4.31.

[53] *See, e.g.*, Auer, *The Future of the DMA, supra* note 7; Auer, *Broken Promises, supra* note 38.

structural remedies. Divestitures cannot, by definition, be market tested, replaced, or revoked.[54] This makes them inherently less compatible with the spirit of the draft guidance than behavioral ones—which, again by definition, are more amenable to these procedural protections.

Given this, we believe a commitment by the CMA to use structural remedies only in exceptional circumstances would have a beneficial impact on SMS firms that may be considering whether to launch new services in the UK (or continue offering them), as they would be assured that the "nuclear option" is a last resort.

Along similar lines, there is also a sense that the CMA should, when possible, favor simple remedies (such as cease-and-desists orders) rather than more complex ones that entail deep product-design changes. Doing so would minimize the risk of unintended consequences and error costs. This is especially true during the early stages of DMCC implementation. Combinations of remedies might have collective effects that are greater than the sum of their parts.

It would also be easier to infer the cause of unintended consequences in the case of individual (rather than combined) remedies. Initially favoring simple remedies will enable the CMA to "learn by doing" by establishing clearer links between conduct requirements and observable outcomes. As it gains enforcement experience, it will be better-positioned to design more intricate remedy packages.

This leads us to a second important consideration. While the CMA's proposed testing, trialing, replacement, and revocation of pro-competitive orders (PCO or PCOs, in plural) is commendable, we regret that some of these procedural safeguards appear to be merely optional under the guidance:

> 4.65 **The CMA may** include specific provisions within a PCO imposing requirements to test and trial different remedies or remedy design options (on a time limited basis) before imposing any PCI on an enduring basis....[55]

This may seem like a detail, but a firmer commitment to systematically trialing new PCOs before they are introduced would signal a desire to protect consumers from

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[54] Draft Guidance, Sections 4.65 to 4.81.

[55] *Id.* Section 4.65.

unintended negative effects of remedies. It would also give firms more leeway to experiment and identify those compliance solutions that reach the best tradeoff between the sometimes-diverging interests of consumers, competition, and the SMS firms themselves. In other words, trialing remedies is a sign of regulatory humility in the face of complex digital markets.

Third, the guidance seems to underestimate the difficulty of assessing some of the metrics on which it relies. This is notably the case of Section 4.12, which explains that the CMA will consider whether "SMS firms' profits reflect a reasonable rate of return based on the nature of competition" or "the competitive positions of SMS firms and their rivals are based on the merits of their respective offerings".[56] Assessing these factors is much easier said than done.

For example, determining whether profits reflect a "reasonable rate of return" amounts to asking what rate of return the firm would earn absent some anticompetitive conduct. This, in turn, requires a robust counterfactual analysis, including, but not limited to, comparative studies of prices for similar products in other countries, etc. This is no easy task. Yet the error costs entailed are significant, as overenforcement could diminish the very price signals on which the competitive process relies. In fast-moving digital markets, the problem is compounded, as what constitutes a "reasonable rate of return" is likely to quickly go out of date.

The guidance should therefore detail how the CMA intends to calculate a "reasonable rate or return", and how it will weigh various factors to determine whether an SMS firm's competitive position is based on competitive merits or on entrenched market power.

Finally, and along similar lines, we believe the CMA's openness to replacing or revoking PCOs based on evidence that they do not sufficiently promote competition should be explicitly complemented by a mirror-image provision that enables replacement or revocation on the basis of evidence that (i) competition has become sufficiently robust to discipline SMS firms, or (ii) that a given PCO's costs outweigh its benefits.

Explicitly contemplating these scenarios in the guidance would ensure that consumer welfare is ultimately the metric by which DMCC remedies are to be evaluated. There

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[56] *Id.* Sections 4.12 (a) and (b).

is, indeed, mounting evidence that DMA remedies in the European Union may not be achieving their stated ambitions because they unintendedly degrade the products of online platforms.[57] At the time of writing, it is still not possible to click through to a Google Maps location from the Google Search engine. The DMA's enforcement has also significantly and negatively impacted traffic to hotel websites.[58] These unintended consequences provide clear evidence that, for the good of consumers, enforcers need to contemplate the possibility that a remedy does more harm than good. By explicitly contemplating these scenarios in guidance, the CMA would exhibit a humility that has, to date, been absent in other jurisdictions enforcing similar regulations.

The upshot is that the CMA's guidance on PCIs is a step in the right direction. It shows a regulator willing to contemplate the possibility of regulatory failure when dealing with the highly complex world of digital-platform markets. Certain aspects of the guidance could, however, be further clarified to reinforce the CMA's commitment to even-handed policymaking.

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[57] *See* Auer, *Future of the DMA*, *supra* note 38; Auer, *Broken Promises*, *supra* note 7.

[58] Kate Harden-England, *European Digital Markets Act Law Should be Rethought, Says Mirai*, TRAVOLUTION (28 May 2024), https://www.travolution.com/news/travel-sectors/accommodation/european-digital-markets-act-law-should-be-rethought-says-mirai.