

## Response to CMA Consultation

### Draft guidance on the digital markets competition regime (CMA194) and draft guidance on mergers reporting requirements for SMS firms (CMA195)

#### 1 Executive Summary

- 1.1 Linklaters welcomes the opportunity to respond to the Competition and Market Authority's ("CMA") consultation on its draft guidance documents for the Strategic Market Status ("SMS") regime established by the Digital Markets, Competition and Consumers Act 2024 (the "DMCC") (the "Guidance").
- 1.2 The SMS regime gives the CMA significant new powers and even more significant discretion on how those powers are exercised. The flexibility afforded to the CMA by the DMCC is a potential strength when compared to more rigid peer regimes. It gives the CMA the opportunity to lead the world in agile and targeted digital regulation. However, the regime will only achieve its goals if the CMA is able to create an environment of regulatory stability, in which companies – whether designated firms or those seeking to rely on the CMA's interventions – can innovate and bring new products to UK consumers on solid ground, rather than shifting regulatory sands.
- 1.3 It is critical that the CMA instils confidence in the business community that its new powers will be exercised in a predictable and proportionate manner. Given the very broad nature of the powers and the relatively few limiting legal principles in the DMCC itself, the Guidance is an important document. Similarly, the CMA's early decisions and its public announcements will carry significant weight for confidence in the regime, and by extension, in the UK itself as a desirable place to invest and innovate.
- 1.4 The Guidance provides welcome additional clarity on how the CMA will approach the SMS regime, but there remain a number of areas where further detail or explanation would be welcome. The subsequent sections of this response give detailed feedback on a chapter-by-chapter basis (with each section number matching the chapter numbers in the Guidance). There are three key themes that run through our response, namely:
- 1.4.1 **Procedural clarity:** As a new regime potentially applying to a broad range of different digital products and services, the Guidance does not establish – and nor should it – a "one size fits all" approach to administering the regime. However, while flexibility to adapt to the case before it is important, we believe all stakeholders would benefit from further clarity on the processes and timetables the CMA will follow.
- Having a baseline in guidance is critical to (i) enable both SMS and non-SMS firms alike to meaningfully and effectively participate in the process; and (ii) mitigate the risk of any potential allegations of unequal treatment that could otherwise arise. Specifically, we think the Guidance could be improved by providing:
- (i) Clarity on decision-making structure and framework: The Guidance helpfully explains the plan to establish a Digital Markets Board Committee which will have responsibility for many of the key decisions under the regime.<sup>1</sup> We understand from the CMA roundtable on the Guidance that the CMA Board

---

<sup>1</sup> See paragraphs 9.29-9.33 of the Guidance

# Linklaters

is yet to finalise the details of how that Committee will operate. As and when those decisions are taken, further clarification in guidance would be very useful to all interacting with the regime. In particular, it would be useful to understand what decision-making mechanism will be in place for each kind of SMS Regime decision, and what access stakeholders can expect to have to decision makers – direct and indirect.

- (ii) Clarity on administrative processes: At present, the Guidance outlines in some detail the public consultation the CMA will undertake.<sup>2</sup> In addition, it would assist all stakeholders if the Guidance set out the key milestones and expected timings that stakeholders should expect in each of the decision-making processes e.g. evidence gathering, relevant CMA publications (for example, “Issues Statements”, “Working Papers”, “Provisional Findings” or similar). Similarly, where the Guidance does suggest the potential for certain key milestones (e.g. “Oral Hearings”<sup>3</sup> in certain circumstances) it should also set out criteria for when the CMA will permit such milestones to form part of the process and timelines for when in the process such milestones are to be expected.

**1.4.2 Clarity on approach to key legal principles**: The DMCC contains relatively few hard-edged legal limits on the CMA’s powers, but where these exist further clarity on how the CMA will approach the relevant concepts would be welcome. The approach of the Guidance seems designed to draw the bounds of these tests as broadly as possible, in some cases expanding their scope beyond the apparent intention of Parliament. While the Guidance rightly reserves the CMA’s discretion to treat different cases differently, it is critical to ensuring regulatory stability that there is clarity around the limiting principles of the regime. For example, as noted in Section 2 (below), setting a clear and consistent framework for the scoping of designated activities and the application of the substantial and entrenched market power tests. Similarly, as noted in Section 3 (below), providing greater reassurance around the CMA’s approach to non-designated activities and the iteration / revision of conduct requirements.

**1.4.3 Codification of the “rights of defence” for SMS firms**: The SMS regime is participative by legislative design and the CMA has rightly identified this as a foundation of the regime. It goes without saying that the decisions taken by the CMA under the regime will have significant impact on designated and non-designated firms alike. However, the regime will only impose legal obligations, and potentially intervene in the ordinary business practices, of designated firms. The powers held by the CMA under the regime have scope for significant interference with the property rights of these firms, and natural justice demands that these firms therefore have proper opportunity to understand the case “against” them, and fully respond. Given the complex and technical nature of the markets, this is also critical to ensure the accuracy and robustness of decisions taken under the regime. The cost of getting these decisions wrong is significant, with potential chilling effects throughout the economy on incentives to invest in bringing new and innovative products to UK consumers and businesses, The CMA will naturally want to ensure its investigations are run in line with such principles, not least to protect the integrity of decisions in

---

<sup>2</sup> See paragraph 9.10 – 9.15 of the Guidance

<sup>3</sup> For instance, see paragraphs 2.83, 4.56, 7.21 of the Guidance.

# Linklaters

any potential challenge, but the Guidance provides no comfort that SMS firms will have any prior or greater consultation rights than third parties. The Guidance must codify the CMA's approach to ensuring SMS firms' rights of defence are respected; to do so would ensure a level-playing field and transparency for all stakeholders. To this end, we believe it is critical that SMS firms:

- (i) are given sufficient opportunity to engage with the CMA's emerging thinking before it becomes public; and, connected with this,
- (ii) are able to fully understand the evidence "against" them, including through accessing underlying evidence where relevant. Where necessary to protect confidential information of third parties, such access could be through a confidentiality ring.

**1.5** Sections 2-8 of this response provide more detailed comments on each chapter of the digital markets guidance, while Section 9 provides comments on the merger reporting guidance.

## **2 SMS designation (Chapter 2)**

**2.1** It is important for all market participants that the Guidance provides for a designation process and assessment that is clear, evidence-based and follows a fair and consistent approach. We have included the below comments intended to enhance the Guidance in pursuit of these aims.

**2.2 Scope of "digital activity" definition:** The CMA's flexibility in defining the scope of digital activities is beneficial in achieving Parliament's intent of a tailored, targeted and proportionate regime. However, it is vital that there is sufficient clarity and specificity around the digital activity in question, to allow SMS firms (and third parties alike) to understand how the regime will apply and be able to exercise their rights and obligations appropriately. Guidance would be enhanced through:

- 2.2.1** providing a more detailed and reliable definition of the designated activity in the designation notice<sup>4</sup>;
- 2.2.2** providing clarity on when / what relevant facts will determine whether the CMA exercises its discretion to group activities into a single designation, once it has determined that the relevant criteria in s3(3) of the Act are met;<sup>5</sup>
- 2.2.3** clarifying when the CMA will unilaterally amend a designated activity under s15(4), as opposed to when the CMA would launch an early re-designation to amend a designated activity under s10 of the Act.<sup>6</sup>

**2.3 Substantial and entrenched market power ("SEMP") test:** The SEMP test is one of the few hard-edged limiting legal concepts in the SMS regime. While the Guidance provides some useful clarity, we have concerns that it also suggests certain procedural and substantive shortcuts for assessment of SEMP that risk creating uncertainty and

---

<sup>4</sup> See paragraph 2.74 of the Guidance only proposes to provide a "relatively brief" description of the designated digital activity that "will set out the overall purpose of the products included in it".

<sup>5</sup> While paragraphs 2.13 – 2.14 of the Guidance indicates how the CMA will interpret the criteria in s3(3) of the Act, it provides no clarity on how the CMA will actually exercise its discretion once the criteria in s3(3) is met.

<sup>6</sup> Paragraph 2.110 of the Guidance provides no clarity on the distinction between amending designations under s10 vs s15(4) of the Act.

# Linklaters

undermining due process. In particular, the Guidance should not permit the CMA to sidestep the legal threshold by:

- 2.3.1 suggesting something akin to a rebuttable presumption of entrenchment where substantial market power is established;<sup>7</sup> the two are intentionally and legally separate tests<sup>8</sup> and each must be proven individually if a designation decision is to be robust to legal challenge. Further clarity on how the CMA will approach the specific question of *entrenchment* of market power would therefore be helpful;
- 2.3.2 watering down the assessment of market power to merely an assessment of available alternatives,<sup>9</sup> which necessarily disregards material factors relevant to the SEMP assessment (e.g. countervailing buyer power, or the potential multiplicity of constraints in multi-sided markets);
- 2.3.3 purporting to disapply<sup>10</sup> the highly relevant learnings from abuse of dominance enforcement on “market power” and “dominance” products and companies involved in these assessments – while we appreciate that the DMCC deliberately establishes a *different* legal test to that of dominance, this case law (some of which relates to the same markets) and practice is far from irrelevant. Indeed, in other sectoral regulatory contexts, such as the telecommunications regime, Ofcom’s assessment of ‘Significant Market Power’ draws on the same framework as dominance;
- 2.3.4 affording itself wide discretion to “group” digital activities, without sufficient limitation to prevent this becoming a back-door for the CMA to designate and/or impose conduct requirements on activities in which there is not substantial and entrenched market power.<sup>11</sup>

**2.4 Position of strategic significance:** The Guidance indicates that in considering whether a firm occupies a strategic position, the CMA will focus only on *ability* to extend power from one digital activity into other activities, and will not consider a firm’s *incentive* to do so.<sup>12</sup> Antitrust enforcement and long-standing enforcement takes as read that a mere ability to leverage power is no basis to intervene unless there is also an incentive to do so; this is logical – for instance if a company would never undertake a certain course of action as it would destroy its business model, it lacks the requisite market power to effectively leverage its position in a given market. While at the stage of setting CRs consideration of incentives may be less relevant (because to prohibit something that a firm has no incentive to do has no effect), to find a strategic position on this basis risks only a partial view of market dynamics, and could lead to erroneous designations.

## 3 Conduct requirements (“CRs”) (Chapter 3)

**3.1 Non-designated activities:** The application of CRs to non-designated activities risks creating significant uncertainty and it is important the circumstances in which the CMA will take such action are clearly delineated. The current Guidance suggests the CMA may impose CRs on non-digital activities based merely on an assessment that conduct is “likely

---

<sup>7</sup> See paragraph 2.52 of the Guidance.

<sup>8</sup> As rightly noted by the CMA itself at paragraph 2.42 of the Guidance.

<sup>9</sup> See paragraph 2.40 of the Guidance.

<sup>10</sup> See paragraph 2.45 of the Guidance.

<sup>11</sup> See paragraphs 2.13 – 2.15 of the Guidance which provide no limitation on CMA’s ability to circumvent its duties by grouping activities.

<sup>12</sup> Paragraph 2.61 of the Guidance.

# Linklaters

*to increase [the SMS firm's] substantial and entrenched market power and/or strengthen its position of strategic significance".<sup>13</sup> We note s20(3)(c) DMCC requires that the conduct is likely to "materially" do so. This qualifier needs to be reinstated in the Guidance, which should also clarify how the CMA will assess materiality in this context.*

**3.2 Tool selection:** Given the flexibility afforded to the CMA in designing / imposing CRs, there is scope for CRs to cover much of the same ground as other CMA tools (such as PCIs).<sup>14</sup> In the interests of certainty, to allow stakeholders to appropriately engage with the CMA and also better foresee the likely form / impact of intervention, it would be beneficial if the Guidance included further detail on how the CMA will consider which tool it will select and how tools (including more traditional CMA tools) will co-exist together.

**3.3 Revising or refining CRs:** The Guidance indicates that CRs may develop through a somewhat iterative process and may be readily revised or refined. Many of the interventions the CMA will take are likely to require significant engineering and design time for businesses, both SMS firms needing to comply, but also third parties seeking to rely on the CMA's interventions. Frequently changing requirements could impose disproportionate re-engineering costs on SMS firms, but would also undermine third parties' trust in the regime. Certainty around the scope and longevity of CMA interventions will also be critical to enable third parties to make informed decisions on whether to invest in re-engineering to take advantage of new opportunities opened up through interventions. The Guidance should therefore provide further clarity on the circumstances in which CRs will be revised or refined.

## 4 Pro-competition interventions ("PCI") (Chapter 4)

**4.1 Relevant factors for determining an Adverse Effect on Competition ("AEC"):** More clarity is needed on the factors that the CMA will assess in determining whether an intervention is required. The Guidance introduces uncertainty in its approach to determining a relevant AEC by permitting the consideration of broad factors outside of the digital activity (to the extent that they contribute to reinforcing or protecting the firm's strategic market status) to also feature in its assessment of whether an AEC arises.

**4.2 Clarity on the commitments process:** It is unclear at what stage of a PCI investigation the CMA would consider undertakings (other than not late in the 9-month period). The Guidance should provide more clarity on this so that SMS firms can engage with the process to offer commitments at an appropriate juncture.

## 5 Investigatory powers (Chapter 5)

**5.1 Demonstrations and tests:** While the ability to require demonstrations and tests (and related requirements to vary business conduct) could be an important evidential tool for the CMA, they also have the potential for significant business disruption. Clarifications in the Guidance around the circumstances in which the CMA will use this power are helpful, as is the explicit note that the CMA will consider the proportionality of any such request. However, in considering the value of the evidence which would be gathered through a demonstration or test, the CMA should consider not only whether it will provide important evidence to support analysis of "an issue", but also (i) whether that issue is an important issue in the broader context of the case; and (ii) the relative incremental benefit of requiring a

---

<sup>13</sup> See paragraph 3.14 of the Guidance.

<sup>14</sup> For instance, regarding the CMA's powers to impose "interoperability" requirements via both CRs (paragraph 3.7 of the Guidance) and PCIs (paragraph 4.24 of the Guidance).

# Linklaters

demonstration or test, when compared with other potential evidence sources (e.g. historical events that could be “natural experiments”).

- 5.2 Document preservation obligations:** The DMCC establishes onerous obligations on SMS firms around document preservation. The Guidance seeks to draw these obligations as broadly as possible, both in terms of when a firm “suspects” a breach investigation or PCI investigation is likely to be carried out, and in relation to the scope of documents caught. Further delimitation of these concepts would assist SMS firms in ensuring practical compliance with these obligations, especially given they seem to require suspension of ordinary course document destruction protocols.

## 6 Monitoring (Chapter 6)

- 6.1 Compliance reporting requirements:** We understand the CMA will provide further guidance on compliance reporting obligations in due course. It would be very helpful for the CMA to provide an indication of the expected frequency and format of compliance reporting, recognising that the precise requirements will rightly vary from firm to firm.

- 6.2 Participative resolution of concerns:** We welcome the clarity in the Guidance around participative resolution of concerns. Further clarity on how such participative resolution processes will be run and on whether / how a SMS firm may initiate such an approach would be welcome.

- 6.3 Nominated Officers:** The CMA helpfully clarified in the Guidance roundtable its view that a firm may nominate different officers for different digital activities and/or CRs. In addition, it would be helpful for this to be reflected explicitly in the Guidance. Given the onerous personal liability that arises with regards to non-compliance on the part of the Nominated Officer obligations, enhanced clarity and a proportionate approach to the CMA’s expectations of this role would be welcome.<sup>15</sup> In particular, by:

**6.3.1** providing greater clarity on the expectation around the frequency and level of engagement with the Nominated Officer, and the extent to which this may vary with different firms / DMCC tools / digital activities;

**6.3.2** not unduly expanding the Nominated Officer’s obligations beyond that which is required in the DMCC (e.g. by imposing a pro-active requirement to immediately raise concerns with compliance without having an opportunity to resolve them<sup>16</sup>); and

**6.3.3** allowing greater flexibility in the identity of the Nominated Officer, beyond a “*senior manager with operational responsibility for the SM firm’s business model, product and design and/or strategy in relation to the relevant digital activity*” to ensure firms can select the most effective candidate within the organisation and efficiently leverage compliance functions already in place for other regulatory requirements, e.g. the EU Digital Markets Act, which has required significant investment by “gatekeepers” in compliance and monitoring functions.

---

<sup>15</sup> See paragraph 6.38 of the Guidance.

<sup>16</sup> See paragraph 6.38(c) of the Guidance.

# Linklaters

## 7 Enforcement (Chapter 7)

**7.1** The Guidance on how the CMA may take enforcement action under the DMCC is well-structured, particularly as guidance is provided on both the key stages of an investigation and the CMA's approach to the enforcement of CRs specifically. However, we consider that the Guidance could go further to provide clarity on how this will work in practice. This is important to both protect the procedural rights of any designated entity, and also ensure that third parties can engage with the CMA in a timely and effective manner.

**7.2** With regard to the **investigation process**, whilst the Guidance lays out in high-level terms the various envisaged stages of an investigation, we would welcome further clarity on: (i) the timings of when specific steps will take place in practice; and (ii) the process involved in these steps, noting that allowing all stakeholders sufficient time to properly engage with the process is important. In particular:

**7.2.1 Provisional decisions:** The Guidance provides little indication of when during an investigation the CMA will issue its provisional decision. We would encourage the CMA to provide a clearer indication of this timing. Firms under investigation must be given sufficient time to prepare and provide any reply to the CMA's provisional findings before the CMA takes its final decision, particularly during conduct investigations which are subject to a statutory timeline (as noted in paragraph 7.20 of the Guidance). Third parties should also be afforded sufficient time to respond and meaningfully engage with provisional decisions. Linked to this is the importance of ensuring that, in all situations where the CMA provisionally considers that a financial penalty should be imposed, the CMA will provide its provisional penalty notice at the same time as the provisional findings on breach (in line with other procedural investigations). To have a delay between these two steps would mean that a firm has reduced time to provide its representations on the provisional penalty notice, which could unfairly impact its position vis-à-vis the CMA.

**7.2.2 Oral hearings:** It is not clear from paragraph 7.21 of the Guidance in what circumstances an oral hearing will be deemed not appropriate. Being able to make oral representations is a key element of a firm's rights of defence and the Guidance should clarify that SMS firms will be given the opportunity for such a hearing in any enforcement investigation.

**7.2.3 Disclosure of evidence:** As noted above, it is critical both to the rights of defence of SMS firms and to ensuring CMA decisions are robust, that SMS firms fully understand the case "against" them. This principle applies to all decisions taken under the SMS regime but is particularly acute in the context of enforcement proceedings. Appropriate provision must therefore be made for SMS firms and/or their advisers to access the key underlying evidence the CMA seeks to rely upon in any enforcement proceedings.

**7.3** Regarding **enforcement of conduct requirements**, there are certain parts of the Guidance where we would encourage the CMA to consider the following amendments, to ensure that enforcement remains within the scope envisaged by the legislation.

**7.3.1 Countervailing Benefits Exemption ("CVBE"):** In the assessment of the CVBE test, the Guidance suggests the CMA will apply case law from an antitrust enforcement context on "indispensability".<sup>17</sup> Parliament removed the word

---

<sup>17</sup> See paragraph 7.68 of the Guidance.

# Linklaters

“indispensable” from the legislation during the legislative process and it would not be appropriate to seek direct read-across from the case law relating to indispensability.

- 7.3.2 Commitments:** Whilst we acknowledge the need for confidence by the CMA that a proposed commitment would sufficiently address the behaviour of concern, it would be disproportionate to require a firm to offer a more extensive commitment than might be needed if the CMA were to impose an enforcement order at the end of a conduct investigation (paragraph 7.79 of the Guidance). Indeed, such an approach would undermine the incentives of firms to offer commitments in the first place, which runs contrary to the purpose of a “no fault” regulatory regime. Rather, the CMA’s assessment should be focussed on whether the proposed commitment is sufficient to remedy the concern. The Guidance also notes that the CMA’s acceptance of a commitment once a conduct investigation has been launched, will likely be rare in practice due to the short statutory time periods (paragraph 7.76 of the Guidance). If so, it is important to ensure that the CMA appropriately engages with the SMS firm where it has concerns about the firm’s compliance with a CR in advance of commencing an investigation.

## 8 Penalties (Chapter 8)

- 8.1** We welcome the CMA’s guidance on when it may consider it appropriate to impose a penalty, and what type, given the potentially significant fines that can be imposed under the DMCC regime. However, there are some aspects of the Guidance which we would encourage the CMA to reconsider:

**8.1.1 Deviations from standard approach:** Whilst we acknowledge that each investigation and penalty will be bespoke to the particular facts in question, it is important that firms are provided with enough information from the Guidance so that they can develop some understanding regarding potential fines. Such topics can have significant impact on firms’ strategies and business plans. We would therefore encourage the CMA to provide a list of factors it must consider when deciding whether it is appropriate to depart from its typical approach to determining relevant turnover as part of its fining calculation. As currently drafted, paragraph 8.27 of the Guidance appears to provide unlimited discretion to the CMA to deviate from the typical approach.

**8.1.2 Timing of provisional penalty notice:** If this notice is issued after the CMA’s provisional findings, this may hinder the firm’s ability to adequately respond to the penalty notice, especially during a conduct investigation (given the statutory time periods). We would recommend that the CMA is firmer in its guidance that it will run a penalty case and an investigation into a suspected break of competition requirements together, as it does so in other procedural investigations. To the extent the CMA deviates from this principle, it must allow sufficient time for the firm to respond to the draft penalty notice.

## 9 Mergers

- 9.1** We welcome the CMA’s Guidance on the mergers reporting requirements for SMS firms. There are certain aspects of the Guidance which could be revised to give relevant parties more certainty and allow the process to be streamlined (see points 9.2 to 9.4 below). We also believe it would be helpful for the Guidance to address the topic of pre-notification, and have included some additional thoughts on this at point 9.5 below.

# Linklaters

**9.2 Simplified notifications:** At present, the Guidance makes no differentiation between different kinds of transactions. We believe it would be helpful if the Guidance made provision for a simplified reporting procedure where (i) the business being acquired does not have any connection with the digital activity or activities for which the SMS firm is designated; and / or the SMS firm has already made a report in relation to the relevant target.

**9.3 UK Nexus:**

**9.3.1** Paragraph 3.12 of the Guidance confirms that "all available evidence in the round will be relevant" to determine whether SMS acquirers expect or intend new joint ventures to supply goods or services in the UK." As the CMA is aware from its existing work, internal documents prepared in the context of potential transactions can often explore a significant number of business models etc. We believe it would be helpful for the Guidance to clarify that the CMA will consider such evidence in the round to indicate a realistic intention to supply goods or services in the UK.

**9.3.2** Paragraph 3.16 of the Guidance refers to indirect supply via subsidiaries or agents as sufficient to meet the threshold for supply of goods and services in the UK. Given the complicated nature of the products often supplied by SMS firms it would be helpful for the Guidance to provide additional detail of what types of indirect supply would be considered sufficient for s57(5)(b) of the DMCC Act.

**9.4 Value of consideration:** The Guidance, reflecting the DMCC, states that the duty to report only arises in relation to transactions or the formation of joint ventures where the total value of all consideration (whether provided before or as part of the 'reportable event') is at least £25 million. The Guidance suggests that in assessing the value of consideration will be considered to include "the value of any previous consideration provided by SMS acquirers in relation to any shares or voting rights already held in the target." The Guidance should make clear this only applies once to each relevant shareholding threshold in the DMCC – i.e. that if an SMS firm has *already* acquired (and notified) 15% of shares, in considering whether the 25% of shares notification obligation is triggered, only the incremental value paid for the incremental shares should be considered.

**9.5 Pre-notification:** The Guidance does not seem to consider the potential for a form of pre-notification to be included in the notification process. We would suggest that the CMA strongly consider introducing the option to submit a draft notification be made available to SMS acquirers who consider that their transaction would warrant additional time for review, e.g. due to the complexities of the markets etc.

## 10 Conclusion

**10.1** The Guidance is an important document that provides welcome clarity on how the CMA will use its significant new powers under the DMCC. Given the broad scope of both power and discretion the DMCC affords the CMA, we believe further refinement and clarification would support the SMS regime in achieving its objectives by fostering confidence in the SMS regime, and by extension, the UK as a place to innovate and invest in digital businesses. Such clarity would benefit all stakeholders, whether firms needing to comply, or seeking to rely, on CMA interventions under the SMS regime. We look forward to working further with the CMA as the SMS regime evolves.

**Linklaters LLP, 12 July 2024**