

Meta's Response to the Consultation on the Digital Markets Competition Regime Guidance

A. Introduction

1. Meta Platforms, Inc. (**Meta**) welcomes the opportunity to respond to this important public consultation on the Digital Markets Competition Regime Guidance (**DMCR Guidance**) and Guidance on the Merger Reporting Requirement for Firms with Strategic Market Status (**Merger Reporting Guidance** and together with the DMCR Guidance, the **Guidance**) setting out how the CMA will approach its functions under Part 1 of the Digital Markets, Competition and Consumers Act (**DMCC Act**, or the **Act**).
2. Digital technologies, such as those offered by Meta, facilitate growth, trade and innovation, including by reducing the costs of marketing, enabling existing businesses to grow and helping new businesses to find product market fit. To keep up with the pace of change in this sector and continue to provide an excellent experience for users as well as value for advertisers, Meta must continuously innovate by improving existing services and launching new offerings. Meta's comments on the Guidance attempt to balance this business reality with the laudable aims of the new digital markets regime.
3. The regime has been introduced with the aim of delivering significant benefits for UK businesses and consumers. It bestows extensive new powers on the UK Competition and Markets Authority (**CMA**) and provides it with significant flexibility to act quickly where needed through a framework based around higher-level principles rather than granular rules.
4. Indeed, the flexibility provided to the CMA can help ensure the regime is future-proofed in the context of fast-moving digital markets. However, the broad discretion afforded to the CMA and the speed at which it is able to act also carry significant risks to legal certainty and procedural fairness – these are conditions that are necessary for innovation to thrive and so are likely to be risks that the CMA will no doubt also be keen to mitigate.
5. These risks should not be underplayed given the CMA will be applying novel concepts and theories of harm in fast-changing product markets: decisions could lead to unintended consequences, or create “winners” and “losers” determined by regulatory decisions *rather* than competitive dynamics and customer choice. The net costs associated with any such decisions could be material – consumers may miss out on improvements to their existing products, or as a result of new products not being launched in the UK.
6. The flexibility afforded to the CMA should therefore be balanced with a degree of certainty. This would help businesses continue to compete effectively and remain incentivised to innovate. Meta believes the regime should aim to create a stable and predictable environment for investment and innovation for *all* firms (those designated as having “strategic market status” (**SMS**) and third parties). This means ensuring that: (a) competition requirements are based on sound evidence and analysis; (b) the CMA takes seriously the impact of its intervention on longer-term incentives to develop new and improved products; and (c) requirements are not added to and amended on an ongoing basis unless there is a material change of circumstances and proper consultation.
7. As the Act is intentionally high level about how the digital markets regime will operate in practice, the Guidance is an opportunity to provide important clarity on how the CMA will ensure effective administration of the regime in a way that achieves the intended benefits. Meta welcomes the significant steps made in the

draft Guidance towards supplying that clarity. As further detailed in this submission, Meta believes there remain additional opportunities to support the proper and effective functioning of the new regime. These can help to ensure that the regime is administered consistently across SMS firms and facilitates effective compliance in a way that is not unduly burdensome, whilst minimising the chance of unintended consequences.

8. This submission presents Meta’s preliminary observations on and proposed amendments to the draft Guidance. In particular, Meta proposes that the Guidance should:
 - (a) provide additional detail on the procedure for designating firms as having SMS, including the evidential basis for determining when the SMS criteria are satisfied and the approach to delineating and grouping “digital activities” (**Section B**);
 - (b) provide a clearer framework for the design, implementation and enforcement of conduct requirements (**CRs**) and pro-competition interventions (**PCIs**), including the assessment of proportionality and the countervailing benefits exemption (which are both important safeguards), the interaction between CRs and PCIs, and their application to non-designated activities (**Section C**); and
 - (c) ensure there are structures that facilitate effective compliance, including by harmonising the regime with other digital competition regimes where this would create significant efficiencies for both SMS firms and third parties (**Section D**).
9. Meta looks forward to working with the CMA to achieve regulatory guidance that: (a) protects and enhances the consumer experience of digital services; (b) continues to spur innovation; and (c) provides businesses – not just businesses designated as having SMS – with the certainty they need to compete, innovate and thrive. Meta views the following suggestions as the start of a continued engagement and collaboration with the CMA and remains available for further discussions.

B. The Guidance should provide a clearer roadmap of the procedure for designating firms as having SMS

10. As the first step the CMA will take in regulating SMS firms under the new regime, the SMS designation procedure is key in identifying the parameters around which compliance requirements will then be imposed. As set out in further detail below, Meta considers that:
 - (a) the framework and evidential basis for evaluating and deciding on the satisfaction of the SMS criteria would benefit from further guidance to ensure these novel concepts are applied consistently and on the basis of accurate and up to date information; and
 - (b) the delineation of digital activities and when digital activities will be “grouped” is, at present, unclear; a stronger framework would provide greater predictability for potential SMS firms and third parties.

The framework and evidential basis for determining when the SMS criteria are satisfied would benefit from additional guidance

11. The DMCR Guidance sets out a wide range of factors the CMA may take into account when assessing whether a potential SMS firm has “substantial and

entrenched market power”.¹ However, there is currently limited guidance on how the CMA will assess the relative importance of different factors or how conflicting factors may be weighed against one another. It would be helpful to provide further guidance on this given it is a novel legal concept.

12. First, the DMCR Guidance appears to indicate that qualitative factors alone *could* be sufficient to support an SMS designation.² Some quantitative thresholds – even if rebuttable, like those included in the EU Digital Markets Act (**DMA**) – would create greater certainty and allow third parties as well as smaller challenger products of SMS firms to compete vigorously knowing they will not face the regulatory obligations that could apply to designated digital activities. For example, where the DMCR Guidance sets out numerical metrics the CMA may consider in its assessment,³ it could provide some indication (whether in absolute or relative terms) of the scale required for such metrics to be suggestive of having SMS.
13. Second, the DMCR Guidance provides limited information on how the CMA will assess whether market power is “entrenched”. While the DMCR Guidance correctly acknowledges that “substantial” and “entrenched” are distinct concepts and that each needs to be demonstrated,⁴ it suggests that there will be a presumption that any substantial market power is entrenched.⁵ This goes beyond the wording of the Act⁶ and should be brought more clearly into line with Parliament’s intent, as expressed in the legislation. The DMCR Guidance would also benefit from additional transparency on:
 - (a) what factors the CMA will consider when assessing whether substantial market power is “entrenched” (e.g., the absence of new entrants in respect to the relevant digital activity); and
 - (b) how the CMA will assess whether substantial market power is “entrenched” for nascent products and technologies. Given the higher risk of errors and unintended consequences when seeking to regulate new and emerging products, the DMCR Guidance should expressly recognise that the depth of analysis will need to be greater in such circumstances.
14. Third, the DMCR Guidance indicates that the CMA will not typically seek to draw on dominance case law.⁷ While “dominance” and “substantial and entrenched market power” may be different legal concepts, there is a meaningful degree of overlap given the relevance of market power for both concepts. In such circumstances, taking into account the decades of decisional practice and case law relating to “dominance” (without the CMA being bound by this) would provide greater predictability around the assessment of “substantial and entrenched market power”. This could be supplemented with guidance and indicative examples of when a firm that is unlikely to be “dominant” could still be found to have “substantial and entrenched market power” (and vice versa).
15. Related to this, the DMCR Guidance notes that the CMA may have regard to evidence and analysis from previous CMA investigations when assessing whether a firm has SMS with respect to a digital activity.⁸ Digital markets evolve and develop quickly, which means evidence provided just a few years ago and

¹ For example, DMCR Guidance, para. 2.41.

² For example, DMCR Guidance, para. 2.63.

³ For example, DMCR Guidance, para. 2.55.

⁴ DMCR Guidance, para. 2.42.

⁵ For example, DMCR Guidance, para. 2.52: “As such, 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, where there is no clear and convincing evidence that relevant developments will be likely to dissipate the firm’s market power” (emphasis added).

⁶ As set out in the DMCC Act, s. 5.

⁷ DMCR Guidance, para. 2.45.

⁸ DMCR Guidance, footnote 31 and para 2.65.

the ensuing analysis may have less evidential value as time passes by. The DMCR Guidance should therefore expressly note that: (a) the CMA will assess whether evidence or analysis from previous investigations remains probative in light of current and evolving market conditions; and (b) SMS firms will have the opportunity to make representations in relation to evidence and analysis being used from previous CMA investigations (and provide updated information where possible).

The CMA's approach to the delineation and grouping of digital activities should provide greater predictability and certainty for potential SMS firms and third parties

16. The Act adopts a broad definition of “digital activity” and the circumstances in which two or more activities can be grouped together as a “single digital activity”.⁹ As well as having a significant impact on how SMS firms comply with regulatory requirements, the flexibility of application has the potential to skew competition between SMS firms if an inconsistent approach to grouping is adopted in areas where multiple firms are active in the same space.
17. The DMCR Guidance currently provides a limited steer on these concepts beyond what is set out in the Act. The “gatekeeper” and “core platform service” designation process in the context of the DMA has demonstrated that the boundaries of activities undertaken by digital firms is neither self-evident nor universally understood. As such, Meta considers that additional clarity is important for the effective administration of the regime in the following areas:
 - (a) the decision to designate a “digital activity” should include more than a “brief” description of the digital activity and the “overall purpose” of the products included within it, as this would not provide sufficient clarity on the scope of the “digital activity” and therefore what is required from a compliance perspective.¹⁰ The designation decision should also clearly set out: (i) the firm’s current products and services included within the “digital activity”; and (ii) sufficient detail on the purpose and outer boundaries of the “digital activity” so that firms can assess whether new products and services could fall within the “digital activity”. This approach would still be non-exhaustive in line with the Explanatory Notes to the Act;¹¹ and
 - (b) the approach to assessing which digital activities may be grouped together should be based on close links between the purpose and delivery of products and the user-facing experience.¹² The DMCR Guidance should therefore remove the broad-brush reference to “any relevant aspect” of the products, and make clear that the CMA will take into account representations from the potential SMS firm on how their products operate in practice.

C. The Guidance should provide a clearer framework for the design, implementation and enforcement of CRs and PCIs

18. The CMA’s powers to impose CRs and PCIs provide it with the ability to dramatically impact competitive dynamics between firms in a way that could spur or (inadvertently) stifle innovation. The DMCR Guidance can maximise the prospect of a pro-competitive impact by:

⁹ DMCC Act, ss. 3(1) and 3(3).

¹⁰ DMCR Guidance, paras. 2.74 and 2.89(b).

¹¹ Explanatory Notes, para 157.

¹² DMCR Guidance, para. 2.14.

- (a) bolstering the assessment of proportionality and the countervailing benefits exemption (**CBE**), which are important safeguards to minimise the risk of unintended consequences;
- (b) clarifying how the CMA will consider when to use CRs versus PCIs, and when to apply either to non-designated activities; and
- (c) providing a clearer roadmap for how the CMA will run its process, including on investigatory steps, the approach to remedies and commitments, the final offer mechanism (**FOM**), access to evidence and interviews with employees.

Proper safeguards are key to minimise the risk of unintended consequences

Proportionality should be considered at each stage of the assessment, design and implementation of CRs and PCIs

- 19. Proportionality is a critical safeguard in the legislation, deliberately included to ensure the regime does not reduce the overall level of value that digital services provide to the UK economy, businesses and consumers. It should therefore play a prominent role when considering whether to impose a CR or pro-competition order (**PCO**), in the design of any requirement or remedy and in the assessment of compliance.
- 20. One way to achieve this is to consider it earlier. Instead of listing proportionality as the final step¹³ in the design of a CR, the CMA should consider upfront whether the aim of the CR is proportionate to the issue identified. The CMA should also ensure it is taking a long-term focus, taking into account firms' incentives to invest and to innovate.
- 21. There also appears to be a material omission in the list of factors set out in the DMCR Guidance for consideration when assessing whether it would be proportionate to impose a CR.¹⁴ The DMCR Guidance includes all the factors set out in the Explanatory Notes to the Act (e.g., burdens on SMS firms and the safety and privacy of users) with the exception of "*freedom of contract and property rights*". This is an important factor that should be included to bring the DMCR Guidance in line with Parliament's intent (as expressed in the Explanatory Notes).¹⁵

The DMCR Guidance should not dilute the importance of consumer benefits

- 22. Certain aspects of the DMCR Guidance appear to minimise the role and importance of the CBE in preventing unintended consequences and preserving the benefits of the digital activity.¹⁶ In particular:
 - (a) The DMCR Guidance suggests a higher evidentiary bar for applying the CBE than is set out in the Act (i.e., that the CBE case should be supported by "*clear and compelling evidence*"),¹⁷ which is not prescribed for other assessments to be carried out by the CMA. Moreover, such a bar may in fact be impossible to meet for new products or features that would be launched for the first time. The DMCR Guidance should make clear that the evidentiary bar to support the application of the CBE is not greater than the evidentiary bar required of the CMA when deciding to impose a CR.

¹³ DMCR Guidance, paras. 3.17(c) and 4.20(c).

¹⁴ DMCR Guidance, para 3.31.

¹⁵ Explanatory Notes, para 180.

¹⁶ Explanatory Notes, para. 211-212.

¹⁷ DMCR Guidance, para 7.60.

- (b) The DMCR Guidance suggests that where the CMA has already considered the benefits to users or potential users when formulating and imposing a CR, an SMS firm would need to produce new and additional evidence should it seek to rely on the CBE in a conduct investigation.¹⁸ Given the potential time period between imposing a CR and a conduct investigation, failure to consider or reconsider benefits could result in harmful outcomes for competition and consumers. This requirement goes further than the provisions of the Act and should be omitted to bring it back into line with the legislation.

- 23. In addition, the DMCR Guidance currently dedicates only one paragraph to the proportionality assessment of the CBE criteria, which itself only defines proportionality.¹⁹ This could use additional guidance, for example, on how the CMA will assess representations from SMS firms on this point.

The DMCR Guidance should provide a clearer framework for the circumstances in which CRs and PCIs will be imposed

The DMCR Guidance is counterproductively vague on the interaction between CRs and PCIs

- 24. The DMCR Guidance provides very limited guidance on how the CMA will decide whether to use CRs or open a PCI investigation, and what factors will be taken into account in this assessment.²⁰ It is clear from the Act that these tools are intended to be used for different purposes and that they can impose different requirements or restrictions on SMS firms.²¹ The DMCR Guidance should therefore (at the very least) provide a framework for how the CMA will consider which is the more appropriate tool in order to provide businesses with greater legal certainty and predictability around the administration of the regime. This is all the more important given the differences in the legal framework, procedure and available enforcement actions with respect to CRs and PCIs.

- 25. In particular, the DMCR Guidance should clarify in further detail the differences in objectives and remedies for CRs and PCI investigations:

- (a) *Objectives:* greater clarity as to the type of conduct that CRs and PCIs are intended to address. For example, the CMA could clarify whether, given their application to multiple SMS firms, it considers that PCIs are the appropriate tool to deal with: (i) circumstances where the CMA is seeking to re-shape how a market is functioning; and (ii) market-wide issues.
- (b) *Remedies:* greater clarity as to the interplay between CRs and PCIs with respect to the CMA's proposed remedies. For example, the DMCR Guidance should make clear that, for more intrusive remedies, the PCI route might be more appropriate given the clear legislative intent for this and the higher level of procedural safeguards afforded to SMS firms.²²

The DMCR Guidance should clarify how CRs and PCIs apply to non-designated activities

- 26. The Act provides that CRs may only be imposed on non-designated activities in specific circumstances – i.e., for the purpose of preventing a SMS firm from carrying on activities other than the relevant digital activity in a way that is “likely” to “materially” increase the undertaking’s market power, or “materially” strengthen its position of strategic significance, in relation to the relevant digital

¹⁸ DMCR Guidance, para 7.62.

¹⁹ DMCR Guidance, para. 7.71.

²⁰ DMCR Guidance, footnote 106.

²¹ For example, DMCC Act, ss. 19(3) and 46(1).

²² For example, DMCC Act, ss.46(1) and 49(1). See also Explanatory Notes, para. 287.

activity.²³ A broad application of CRs to non-designated activities would go beyond the purview of the Act and risk stifling innovation and competition in those areas where no SMS exists. It is therefore important that the DMCR Guidance is clear on how key terms (such as “likely” and “materially”) will be interpreted by the CMA. For example, there should be a rigorous framework setting out when there is (and is not) sufficiently clear and compelling evidence of a *material* impact on market power or strategic significance – and express consideration of the CBE – to justify the imposition of a CR on a non-designated activity. This framework should include the factors the CMA will take into account in assessing such evidence and should make clear that the evidential bar for imposing a CR on a non-designated activity should be higher than for a designated activity given the heightened risk of unintended consequences.

27. With respect to PCIs, the Act is clear that the CMA’s power to make a PCI depends on the CMA finding that “*a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition*”.²⁴ The DMCR Guidance goes further by suggesting that factors giving rise to an adverse effect on competition (**AEC**) may relate to an activity external to the digital activity for which the SMS firm is designated as long as there is any “*connection*”.²⁵ In this regard, the DMCR Guidance is inconsistent with the wording in the Act and it also appears inconsistent with the stated purpose of this tool (i.e., to tackle the root source of the SMS firm’s market power).²⁶ A PCI based on factors outside of the designated digital activity is less likely to tackle the root source of market power with respect to the designated digital activity and is therefore less likely to be an appropriate focus for a PCI. The DMCR Guidance should therefore provide additional clarity on how it will assess whether a factor “relates” to a relevant digital activity.

The DMCR Guidance should provide a clearer roadmap for how the CMA will run its processes relating to CRs and PCIs

The consideration of effective CRs, PCIs and commitments should be more flexible from a timing perspective and not judged primarily by reference to specific customer outcomes

28. The DMCR Guidance unnecessarily limits the CMA’s flexibility in considering effective CRs, PCI remedies and commitments.
29. First, in relation to PCI investigations:
- (a) While Meta agrees that there is a clear benefit to the CMA in considering remedies from the outset of a PCI investigation (i.e., alongside an assessment of whether there is an AEC),²⁷ the DMCR Guidance should specify more clearly how the CMA will safeguard SMS firms’ procedural rights throughout any early engagement on possible remedies and avoid prejudicing an AEC finding.
 - (b) The DMCR Guidance suggests that remedies proposed at a later stage of an investigation may not be taken into account.²⁸ The DMCR Guidance should leave open the possibility of assessing and accepting remedies at a late stage in the process, given that the nature and scope of an alleged AEC may only become clear later on in a PCI investigation. To the extent the CMA has concerns around timing, there are mechanisms in the Act that would enable a later consideration of remedies – for example, an

²³ DMCC Act, s. 20(3)(c).

²⁴ DMCC Act, s.46(1)(a).

²⁵ DMCR Guidance, para. 4.17.

²⁶ Explanatory Notes, para. 9.

²⁷ DMCR Guidance, para. 4.52.

²⁸ DMCR Guidance, para. 4.92.

ability for the CMA to extend a PCI investigation by up to three months for special reasons.²⁹

30. Second, and in a similar vein, the DMCR Guidance suggests that the CMA's acceptance of a commitment after a conduct investigation has been launched will be rare.³⁰ This is inconsistent with the Explanatory Notes, which specifically provides an example of a commitment being accepted after a conduct investigation has been opened.³¹ The determination of when and whether to accept commitments should be case-specific. While early engagement gives the CMA more time, there are various reasons why a commitment may only be offered after a conduct investigation is launched. This point should therefore be removed from the DMCR Guidance.
31. Third, at various points, the DMCR Guidance implies that customer behaviour will be used as a key factor in determining whether a competition requirement (e.g., a CR or PCO) would be, or has proven, effective.³² However, even if the ultimate outcome is not one envisaged by the CMA, this does not necessarily mean that the competition requirement was ineffective; for instance, it may equally be the case that a competition requirement was not, or is no longer, required. Therefore, the DMCR Guidance should make clear that the consideration of whether a competition requirement is effective will not necessarily be judged by reference to specific outcomes in respect of customer behaviour.

The CMA should provide additional detail on the steps that the CMA will take when conducting consultations and investigations for CRs and PCIs

32. The DMCR Guidance provides limited detail on the steps that parties and the CMA will need to take for each assessment envisaged in the Act with respect to CRs and PCIs. In contrast to guidance that the CMA has published on market investigations and Competition Act 1998 (**CA98**) investigations,³³ the DMCR Guidance does not set out details regarding: (a) how and when the CMA will share its early thinking and give regular updates (e.g., State of Play meetings); (b) when SMS firms and third parties will have opportunities to make representations; or (c) indicative time periods for responding to provisional or proposed decisions (both in writing and orally). Such guidance would help ensure that the regime is effectively administered for all involved, including the CMA, potential SMS firms and third parties.
33. There are also additional specific areas where the process could be set out more clearly in the DMCR Guidance:

(a) Testing and trialling of remedies

The DMCR Guidance provides welcome clarity around when the CMA may impose a PCO on a "trial" basis to help determine whether a proposed remedy will be sufficiently effective.³⁴ However, even where it is *possible* to test/trial a remedy in advance of implementation, this is likely to require a significant amount of engineering and other resources, especially to ensure testing/trialling is conducted in adherence with other legal obligations (e.g., data privacy). Therefore, the CMA should engage closely with SMS firms to ensure its use of its testing/trialling

²⁹ DMCC Act, s.104(1) and (8). The CMA can also extend the period for imposing a PCI (already four months from the date of the PCI decision notice) by up to two months (DMCC Act, s. 50(4)).

³⁰ DMCR Guidance, para. 7.76.

³¹ Explanatory Notes, p. 38.

³² DMCR Guidance, paras. 4.31(d) and 6.67.

³³ See Guidelines for market investigations: Their role, procedures, assessment and remedies (CC3), April 2013 para 62 *et seq.* and Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), December 2021 para. 9.8 *et seq.*

³⁴ DMCR Guidance, paras. 4.65 – 4.69.

power is proportionate, similar to its assessment of whether to require demonstration and testing.³⁵

(b) “Supplementing” CRs and interpretative notes

Unlike for PCOs, the Act does not envisage that CRs may be imposed on a “trial” basis. Rather, the Act allows the CMA to vary a CR, subject to the same requirements that apply when the CMA imposes a new CR on an SMS firm.³⁶ The process for varying CRs is explained clearly in the DMCR Guidance,³⁷ which also sets out the circumstances where a variation may be appropriate.³⁸ The DMCR Guidance should clarify that this is not a low threshold – given the complex and time-consuming efforts that SMS firms will likely need to make to comply with CRs, frequent variations to CRs will be incredibly burdensome for SMS firms where those (seemingly minor) variations require material changes to compliance solutions. This is also likely to cause disruption, instability and a worse experience for UK consumers.

The DMCR Guidance also sets out other – less formal – ways in which CRs could be supplemented, in particular that: (a) CRs may be supplemented over time with more detailed requirements;³⁹ and/or (b) interpretative notes could be published and updated to reflect changing circumstances.⁴⁰ This goes beyond the Act and there is limited guidance on what procedure will be used when supplementing CRs in these ways, including what safeguards, if any, will be afforded to SMS firms. This undermines the predictability afforded by the formal variation process. The DMCR Guidance should therefore:

- (i) provide assurances that the CMA, in the vast majority of cases, expects CRs to be formulated and specified in a way that provides stability for a meaningful period of time;
- (ii) specify the circumstances where the CMA envisages it being appropriate to supplement CRs in this way as opposed to using the mechanism to vary CRs expressly set out in the Act;
- (iii) state that, before supplementing CRs or publishing interpretative notes, the CMA will undertake a proper consultation in line with the requirements for varying a CR, including seeking representations directly from the SMS firms;⁴¹ and
- (iv) provide further detail on how the CMA will take into account the compliance burden on SMS firms (i.e., of having to rebuild or re-engineer complex compliance solutions) and the impact on consumer experience before deciding to supplement (or vary) CRs.

(c) Transitional measures

The DMCR Guidance provides limited clarity as to the scope and time period for which the CMA may impose “transitional, transitory or saving” measures with respect to “expired” CRs and PCOs.⁴² The DMCR Guidance should set out that such measures can only be imposed for a short (and

³⁵ DMCR Guidance, paras. 5.10 – 5.14.

³⁶ DMCC Act, s.25.

³⁷ DMCR Guidance, para. 3.78 – 3.82.

³⁸ DMCR Guidance, paras. 6.81 – 6.82.

³⁹ DMCR Guidance, para. 3.27.

⁴⁰ DMCR Guidance, paras. 3.53 – 3.58.

⁴¹ The DMCR Guidance notes that the CMA will only “typically” engage with the relevant SMS firm and other stakeholders before updating interpretative notes (para. 3.56).

⁴² DMCC Act, s. 17(1), (4)-(5); s. 53(4)-(5). DMCR Guidance, paras. 3.73 and 4.77.

specify the maximum) period of time. This would ensure SMS firms are not unnecessarily and disproportionately burdened for a long period of time.

The DMCR Guidance should provide additional clarity and transparency around the CMA's role in the FOM

34. The DMCR Guidance provides welcome clarity regarding the “last resort” application of the FOM process.⁴³ However, the FOM process should not be operationalised in a way that undermines SMS firms’ ability to contract freely and innovate their services to meet market demand. In this respect, Meta considers that the following clarifications would be welcome:
- (a) Clarifying that an SMS firm can walk away from a transaction. The DMCR Guidance should be clearer that the FOM process relates to the settlement of disputes regarding payment terms only – and is not a mechanism that could be used to require the SMS firm to agree to enter into, or remain in, a contractual relationship with a counterparty. This is already implied by the acknowledgement that outstanding issues may still need to be resolved subsequent to the FOM process.⁴⁴ This clarification would show the importance that “freedom of contract” plays in the imposition of a CR in line with the Explanatory Notes.⁴⁵
 - (b) Identifying the factors the CMA will take into account in the assessment of bids. The DMCR Guidance provides little guidance on this, noting only that this “*will be based on an assessment of the strength of the evidence and the methodology provided by each party*”.⁴⁶ Given the novel price-setting role being adopted by the CMA under the FOM, it will be important for parties to understand the factors that the CMA will take into account when assessing bids. Such factors should include: (i) the costs borne by the SMS firm for delivering the service, including any indirect costs from delivering an engaging user service; and (ii) the benefits (both direct and indirect) to the counterparty arising from the services provided by the SMS.

The DMCR Guidance should provide further assurances about access to file

35. Given the potentially intrusive nature of CRs and PCIs, it is important that SMS firms have proper access to the CMA’s file. As currently contemplated under the DMCR Guidance, SMS firms will only be entitled to the “gist” of the evidence in certain circumstances.⁴⁷ This is likely to prevent SMS firms from being able to properly assess the evidence and provide adequate representations. This is a more limited right than what is afforded to parties in CA98 investigations, where opportunity to inspect the file is explicitly acknowledged as being “*to ensure that [firms] can properly defend themselves*”.⁴⁸ Proper access to evidence would also help to ensure sound decision-making in the context of a new regime with untested tools and powers.

The DMCR Guidance should balance the CMA's interview powers with a party's rights of defence

36. The DMCR Guidance currently contemplates that the CMA could exclude a firm and its advisers from interviews with the firm’s own employees.⁴⁹ Many of the processes set out in the Act (for example, SMS designation and the imposition of CRs and PCIs) are not based on any wrongdoing on the part of the potential SMS

⁴³ DMCC Act, ss. 38(1)–(4); DMCR Guidance paras. 7.116–7.125, 7.139.

⁴⁴ DMCR Guidance, para. 7.124(a).

⁴⁵ Explanatory Notes, para. 180.

⁴⁶ DMCR Guidance, para. 7.139.

⁴⁷ DMCR Guidance, paragraph 7.28.

⁴⁸ Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (CMA8), December 2021, para. 11.21.

⁴⁹ DMCR Guidance, para. 5.41.

firm or individual employee. It is not therefore clear the basis on which the potential SMS firm should be excluded from such interviews. This approach will also hinder the ability of SMS firms to understand the CMA's assessment and to provide adequate representations.

D. The Guidance should ensure there are structures to facilitate effective administration and compliance

37. The effectiveness of the digital markets regime will be impacted by the implementation of competition requirements by SMS firms and the overall administration of the regime. The Guidance can facilitate effective compliance by ensuring the framework is administrable and allows the CMA to benefit from learnings and efficiencies from other regimes.

The DMCR Guidance should be harmonised with other digital regimes where appropriate

38. Meta recognises the importance of ensuring effective compliance with regulatory requirements and embedding a culture of compliance throughout its organisation. To that end, Meta has invested significant resources in systems and controls tailored to the way its product and business units are structured. For example, to ensure its ongoing compliance with the DMA, Meta has implemented three "lines of defence" consisting of: (a) ensuring product, policy and operations teams are responsible for owning and managing risks with respect to their own products, services and solutions; (b) a compliance function consisting of a Head of Compliance, a Global Data Protection Program Director, a Head of the Compliance Function and a sizeable core team of Meta employees to review and monitor Meta's compliance with the DMA; and (c) an internal audit function which provides objective and independent assurance that the first and second lines of defence functions are operating effectively.
39. It would be counterproductive and result in significant inefficiencies if the DMCR Guidance did not allow SMS firms to use existing compliance structures, where they are shown to be robust and effective. In this respect, the draft DMCR Guidance currently prescribes an approach that is overly restrictive and inconsistent with the requirements of the Act.

Appointment of "nominated officers" for compliance

40. The Act requires the appointment of one or more "nominated officers" who will oversee overall compliance with relevant requirements.⁵⁰ The DMCR Guidance limits this role to an individual responsible for the firm's business model, product design and/or strategy,⁵¹ and provides no guidance on when multiple nominated officers can be appointed. This is neither necessary nor consistent with the requirements of the Act, which aligns the definition of "nominated officer" with that of "senior manager" (i.e., an individual that "*plays a significant role*" in making decisions about how the firm's relevant activities are to be managed or organised, or managing or organising the firm's relevant activities).⁵²
41. Similarly, the DMA requires only that SMS firms introduce a compliance function that has "*sufficient authority, stature and resources, as well as access to the management body of the gatekeeper to monitor*".⁵³
42. Pursuant to this requirement, Meta has designed a new DMA compliance function, overseen by the Head of Compliance who is answerable directly to an independent committee of Meta's Board of Directors. Meta's approach to

⁵⁰ DMCC Act, ss. 83(2), 83(5), 87(3), 88(5); DMCR Guidance para. 6.31, 6.34, 6.38.

⁵¹ DMCR Guidance, para. 6.34.

⁵² DMCC Act, s.83(5).

⁵³ Article 28(1) DMA.

compliance under the DMA could also achieve compliance with the relevant provisions in the Act while preserving the independence of the nominated officer.⁵⁴ The Head of Compliance is in charge of ensuring and assessing compliance with, and has oversight over, all issues concerning the DMA. A person who has the same or similar responsibilities could be considered to “play a significant role” in managing and making decisions about Meta’s activities, and therefore satisfy the definition of “senior manager” as set out in the Act. On this basis, the DMCR Guidance could clarify that effective compliance could be achieved through a nominated officer that has “access” to people responsible for a firm’s business model, product design and/or strategy.

Appointment of a “senior manager” in relation to information notices

43. Similar to the role of the “nominated officer”, the DMCR Guidance limits – and is inconsistent with the Act with respect to – the personnel who are able to fulfil the role of a “senior manager” responsible for compliance with an information notice.⁵⁵ By requiring that a “senior manager” is a senior executive or executive Board member, the DMCR Guidance risks creating a compliance regime for information notices that is impractical, burdensome and disproportionate.
44. Persons holding such positions are unlikely to be the relevant individuals to ensure compliance with an information notice as they have limited involvement in the day-to-day management of any services. Instead, there will be other individuals who play a “significant role” in how the relevant activities are managed, therefore qualifying as “senior managers” as defined in the Act.⁵⁶ The DMCR Guidance should therefore be changed so that it is in line with the provisions of the Act.

The merger reporting requirement could be made more efficient including through further alignment with the DMA

45. The merger reporting requirement is another area where the CMA should consider where there may be further efficiencies (both for the CMA and for SMS firms) in aligning with the approach adopted by the DMA. For example, the purpose behind the mandatory merger report under the Act is identical to the reporting requirement under DMA Article 14. Meta believes that aligning with the information requirements of the DMA would facilitate regulatory dialogue and would generate efficiency while discharging the purpose of the reporting obligation. Specifically:
 - (a) Information required in the draft merger reporting notice appears to be more than is necessary for its purpose. The single purpose of the notification and associated suspensory obligation is to notify the CMA of the existence and basic facts of a transaction before its completion. The information required by the draft notice goes beyond that purpose. The CMA should consider expressly limiting the volume of information required to be submitted in response to no more than five pages in total (the same guidance as for standard briefing papers) and should either omit questions 6, 8, 9, 10 and 11 of the draft merger reporting notice or provide expressly that responses to these questions ought to be brief. If required, the CMA can request further information under its Enterprise

⁵⁴ To ensure that members of Meta’s DMA compliance function can assess compliance independently, members of the compliance function do not have direct reporting lines into operational functions and are not subject to any form of indirect control by any operational function. Moreover, an independent committee assesses on an ongoing basis Meta’s Head of Compliance, the strategies and policies put in place by the compliance function as well as its governance structure – while compliance at a product level is overseen by product, policy and operations teams.

⁵⁵ DMCC Act, ss. 70(1), 70(3), 87(2), 88(5); DMCR Guidance para. 5.26.

⁵⁶ DMCC Act, s. 70(3).

Act powers – but that ought not to delay the commencement of the waiting period.

- (b) Information required in the draft merger reporting notice may not be available to minority investors. The draft merger reporting notice requires that SMS acquirers provide information on the target's main and expected customers, as well as any pipeline or planned future products/services. This information may not be available to a minority investor. The CMA should make clear that a notification will not be incomplete for the purposes of starting the waiting period where omissions relate to target information not available to the acquirer. The CMA could request such information from the target as part of its existing information-gathering powers.
- (c) Approach to initial enforcement orders (IEOs) should reflect the low risk of pre-emptive action in anticipated mergers. The approach to IEOs should reflect the low risk of pre-emptive action in the case of anticipated mergers. The Merger Reporting Guidance should simply refer to the approach taken in the CMA's guidance on interim measures in merger investigations.⁵⁷
- (d) Non-public transactions should be kept confidential unless and until the CMA opens a full investigation. Unlike the DMA, the legislation makes no provision for publicising transactions as standard practice. For the avoidance of doubt, the Merger Reporting Guidance should clarify that the CMA will not publicise a deal unless and until it announces a decision to launch a formal investigation.⁵⁸

The CMA should clarify its process for engaging with other regulators

- 46. The DMCR Guidance notes that, in order to ensure effective coordination with different regulatory regimes, the CMA will be open to input from the wider regulatory community via public consultation or bilaterally.⁵⁹ Meta agrees that there may be certain benefits in this type of wider engagement, particularly to avoid divergent approaches which may not be in the interests of potential SMS firms, third parties or the CMA.
- 47. In order to provide clarity for potential SMS firms on how information provided to (or by) the CMA pursuant to the digital markets regime may be used, the DMCR Guidance should set out the procedures the CMA will adopt before engaging in bilateral information exchange with other regulators – as well as the safeguards regarding how information will be used. For example, the DMCR Guidance should make clear the extent and purposes for which the CMA would seek to share information with other regulators and whether such information sharing will be made pursuant to waivers with the relevant parties, or whether there are particular statutory “gateways” the CMA is envisaging to use in certain circumstances.

The duty of expedition places obligations on the CMA as well as SMS firms

- 48. The DMCR Guidance explains the implications of the CMA's duty of expedition with reference to the obligations on parties to cooperate with administrative timetables and to avoid making late, duplicative or unnecessarily lengthy submissions.⁶⁰

⁵⁷ Guidance on interim measures in merger investigations (CMA108), December 2021.

⁵⁸ The Merger Reporting Guidance states that the CMA will only contact third parties in relation to transactions that are in the public domain, but does not comment more generally on publicity.

⁵⁹ DMCR Guidance, para 9.38.

⁶⁰ DMCR Guidance, paras 9.23 to 9.26.

49. While the DMCR Guidance acknowledges that the CMA will be “*fair and reasonable*” in its requests for information and when setting deadlines for parties to respond,⁶¹ it should also explicitly acknowledge the duty on the CMA itself to consider the efficiencies in its own processes, including the volume of information requested and the consideration of whether to request tests or trials.
50. Furthermore, the duty of expedition should not be used as a reason for expediting processes at the expense of a thorough and evidence-led investigation, respect for parties’ rights of defence (which may reasonably entail the submission of lengthy submissions) or opportunities for parties to engage in commitments discussions to resolve perceived compliance issues.

E. Concluding remarks

51. As the UK digital sector continues to grow and transform the UK economy, the CMA will play a vital role in ensuring that competition and innovation continue to thrive in the UK.
52. The Act confers significant powers on the CMA and the Guidance provides an opportunity to detail how the CMA will ensure effective administration of this new regime and provide sufficient predictability, certainty and consistency for potential SMS firms and third parties. This contribution outlines Meta’s preliminary observations and proposed amendments to support these goals. Meta looks forward to continued dialogue on the Guidance with the CMA and other stakeholders.

⁶¹ DMCR Guidance, para 9.24.