

# Microsoft's Response: Consultation on the CMA Digital Markets Competition Regime Guidance

12 July 2024

Microsoft welcomes the opportunity to respond to the CMA consultation on the guidance of how the new UK digital markets competition regime, established by the Digital Markets, Competition and Consumers Act 2024 (DMCC) (Guidance), will operate in practice.

Microsoft has consistently supported efforts around the world for the development of proportionate, transparent and evidence-based regulation which ensures that firms, including Microsoft, operate fairly and without undermining the ability of others to compete. We continue to do so. We know well from our own experience that competition is the best way to drive innovation and lead companies to develop better products and services at lower cost.

Regulatory certainty is critical to innovation and related investment decisions and the Guidance presents a good opportunity to enable stakeholders to understand and engage with the regime effectively, while ensuring that transparency in decision-making and overall accountability to the public<sup>1</sup> are also maintained. To assist with this, we have included below comments intended to enhance the draft Guidance. These focus on:

- the administration of the digital markets regime set out in Chapter 9, where the Guidance would benefit from additional detail and clarity;
- the CMA investigatory powers, described in Chapter 5, where the protection of undertakings' rights of defence, including access to the file can be enhanced; and
- questions that the CMA may want to consider as relevant in implementing the statutory test for Significant Market Status (SMS) designation, as set out in Chapter 2.

On the whole, our view is that the CMA's approach to digital regulation will need to successfully fit into the existing regulatory framework in a way that both delivers the outcomes the CMA is seeking – in an aligned approach across Departments, by using the right tools to resolve specific concerns – but also ensures overall effectiveness and limits potential for double jeopardy and duplication of work by different, concurrent workstreams. The efficient use of time and resources will be beneficial for both the CMA's own staff and that of participating companies, whether designees under the regime or competitors and customers in digital markets.

Deep engagement by the CMA with digital stakeholders should continue – in line with the proposed participatory approach – to successfully enhance policy-makers' understanding, especially in complex technical matters and in order to receive feedback on how processes are working once implemented. In line with the CMA's public positions, we would recommend for the Guidance to make a specific reference to the participatory approach, and for the CMA to share more about how it sees this working in practice, as the regime takes shape.

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<sup>1</sup> This includes oversight by elected officials, such as through Parliament Committees and the CMA actively taking into account the Government's Statements of Strategic Priorities, as well as being subject to judicial review by the Courts. The Guidance also rightly acknowledges that the CMA "must carry out all of its functions and make decisions in a procedurally fair manner according to the standards of administrative law" ([Para 1.67 of the Guidance](#)).

We especially welcome the significant investments that have been made to build up knowledge and expertise within the Digital Markets Unit (DMU). This will equip that unit – and the CMA more generally – to confidently take judicious decisions on when to actively monitor particular activities or technologies, and when and how to intervene, *if* specific concerns are indeed identified.

The remainder of this document sets out our recommendations on how to establish and further enhance the regime, as it develops over the coming months.

### **A. The DMU relationship with existing CMA tools and processes (Chapter 9 of the Guidance)**

Public statements<sup>2</sup> by the CMA have already acknowledged the relevance of the interaction between existing CMA tools and the new regulatory regime.

The potential for the CMA to run an even more holistic process across all Departments by having senior staff more closely aligned across cases and working together under an “One CMA” umbrella, which we understand is a clear aim of leadership, presents a real opportunity. It would allow for constructive consideration of what the real competition issues are in large cases and help to identify a clearer overall strategic direction for the Executive team to take across Departments. An aligned approach in deciding which CMA tool it is best to use to resolve a specific competition concern and, if needed, a potential to transfer cases between Departments could also assist with prioritisation. This is always important, but now especially so, given the expected increased workload of the organisation.

The CMA Prioritisation Principles state that in deciding whether to act, it will consider whether it is the entity best placed to act and whether there is an appropriate alternative, including potentially active *monitoring*. The CMA will also take account of resources and the risks associated with any CMA action. In assessing these factors, Microsoft would urge the CMA to consider carefully which tool, if any, should be used in each case. Furthermore, in seeking to ensure regulatory intervention is effective, efficient, proportionate and fair, it is essential to avoid consideration of the same or similar issues multiple times. The approach should also seek to reduce inconsistency in analysis and results.

For example, this would ensure that a set of commitments already provided by an undertaking, as is the case in Amazon’s Buy-Box case under the Competition Act 1998 (CA98), are not re-reviewed by the DMU through yet another set of processes under the DMCC. Apart from the impact on resources both for the CMA and the undertaking involved, re-opening a case that has already been run risks contravening the principles of fairness and due process, as well as that of proportionality to which the CMA is expressly subject, under the DMCC when designing and imposing Conduct Requirements (CRs)<sup>3</sup> and Pro-Competition Interventions (PCIs)<sup>4</sup>.

In the context of concurrency, it is worthwhile noting that: first, sector regulators have a statutory duty to consider whether it would be more appropriate to use their competition powers *before* using their regulatory powers.<sup>5</sup> There is no reason why a similar principle should not apply to

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<sup>2</sup> In a [speech](#) on 20 November 2023, Sarah Cardell said: “I mentioned earlier that I have been asked whether the proposed new digital markets regulatory regime will change our approach to mergers. Whilst I don’t think it will or should result in us allowing deals that we would previously have prohibited, I do think the operation of an ongoing regulatory regime will be a factor for us to take into account when considering remedies in individual cases, as we do in other regulated sectors.”

<sup>3</sup> Section 19(5) of the DMCC Act.

<sup>4</sup> Section 46(1)(b) of the DMCC Act.

<sup>5</sup> Schedule 14, Enterprise and Regulatory Reform Act 2013.

digital cases – where the CMA is able to address a concern or resolve a matter more quickly (e.g. through commitments), such tools should be favoured.

Second, in the context of its discretion under the DMCC Act, it would be sensible for the CMA to consider whether the DMU is indeed the entity best placed to act. In the context of CA98 and the Enterprise Act 2002 (EA02), there is a clear requirement for the CMA and concurrent sector regulators to cooperate in deciding who is best placed to take a case forward and to transfer cases between them on that basis, in consultation with affected parties.<sup>6</sup> While the DMU is an integrated part of the CMA, there will be benefits to ensuring there is a clear lead CMA Department on a particular case and for the DMU to operate on the basis of the same principles to those applicable to other regulators.

Finally, the CMA has previously acknowledged that the “likelihood of effective monitoring will be significantly increased, if it is possible to involve a sectoral regulator in the monitoring regime”.<sup>7</sup> Given expertise in their specialist sector, there are various examples of regulators other than the CMA taking on the monitoring and enforcement of remedies, including behavioural remedies, provided by companies under the mergers, markets or CA98 regimes.<sup>8</sup> Digital sector regulatory expertise, through the DMU, may therefore provide an opportunity for the CMA to adopt a more flexible policy on behavioural remedies, especially in mergers, without the need to establish or enhance separate mechanisms to perform these functions.

## **(B) Ensuring robust decision-making (Chapter 9 of the Guidance)**

### ***More clarity on the Digital Markets Board Committee***

The DMCC is clear on the matters that are reserved for decisions by the CMA Board and the new Digital Markets Board Committee (Board Committee).<sup>9</sup>

Microsoft understands that matters relating to the Board Committee membership and structure are subject to further consideration within the CMA and that additional details will be published in the Terms of Reference for this Committee.<sup>10</sup> Once these have been finalised, for the purposes of transparency, there should be significantly more detailed explanation on key matters, including:

- How individuals will be appointed to the Board Committee?
- Will the constitution of any Board Committee regularly change? In this context, it would be helpful to clarify if individuals appointed to make a decision regarding an SMS designation for a particular firm’s digital activity will be different to those serving on the Committee when the CRs for that firm are made (and revoked, in due course).

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<sup>6</sup> Concurrency Regulations 2014, Regulation 7, and Concurrency Guidance, para 3.32.

<sup>7</sup> CMA, Merger Remedies (CMA 87), paragraph 7.6.

<sup>8</sup> For example, there was an Independent Expert to deliver the Adjudication Procedure in the Bauer Media case ([para 14.4](#)), the Office of the Adjudicator – Broadcast Transmission Services ([OTA-BTS](#)) in the Arqiva merger and the Contract Rights Renewal Adjudicator ([CRR Adjudicator](#)) for the ITV case.

<sup>9</sup> As required by the DMCC, the Guidance acknowledges ([paras 9.28 and 9.29](#)) that CMA must establish a Board Committee which is authorised to take a number of decisions including whether to make an SMS designation; impose/revoke a CR; and accept commitments in respect of a PCI investigation.

<sup>10</sup> Microsoft understands the Board Committee will have a similar status to the CMA Audit and Risk Committee and the Remunerations Committee.

More clarity on how the case teams involved in each of these two processes will work in a practical way, together or alongside each other, would also be useful.

- Whether there will be a single Board Committee taking decisions and, if so, how this will operate in practice? It would be helpful to clarify if it will be the entire Committee making these decisions, or if there be small subgroups in a Panel style.
- What access interested stakeholders will have to the Board Committee?
- How consistency in decision-making across both the range of DMU cases and between DMU and other CMA processes will be achieved?
- How independent or otherwise the Board Committee members will be from the CMA's other casework/case teams – it would be helpful to understand how decisions in relation to any involvement in other CMA work will be made and who by. What will be the interaction between the Board Committee and CMA staff, and how decisions taken *other than* by the Board Committee will be made?

### ***Need for internal auditing / red teaming***

The Guidance should also set out specific formal internal review scrutiny and identify key decision-making points within the relevant DMU procedural timeline, both at the Board / Board Committee level and covering 'other decisions' in the structure.<sup>11</sup>

Apart from the processes prescribed in the legislation, there is an opportunity to help enhance the robustness of decisions by actively adopting such long-standing, tested and well-understood mechanisms for quality assurance in regulatory decision-making. This will ensure the CMA's conclusions are more robust.

Similar processes for internal checks and balances, designed to provide a second pair of eyes on key decisions, have been adopted and are successfully run by a range of UK institutions, especially following recommendations in the [2013 Macpherson Review](#). These include various Government Departments, authorities like Ofcom, and have been applied in some previous cases at the CMA (and its predecessor the Office of Fair Trading).

Against this background, we would recommend that the Guidance set out a specific scrutiny process for peer review that is led at the Executive or Senior level (e.g., one or more of the DMU Executive Director or DMU Senior Directors, the General Counsel/Deputy General Counsel or the Chief Economist). These strategic assessments of key evidence should cover cross-checking of economic evidence on pivotal decisions and include "non-decisions" by CMA staff. These could, for example, include cases where a case team has considered a CR as potentially capable of resolving a specific competition concern, but ultimately dismissed the CR as an option, without taking their decision to the Board/Board Committee.

Apart from enhancing the robustness of decision-making, this type of senior internal auditing will also help to ensure consistency and organisational alignment within the CMA and between DMU investigation teams. Implementing such established and well-understood mechanisms for

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<sup>11</sup> Para 9.34 of the Guidance.

quality assurance in regulatory decision-making will not only ensure the CMA's conclusions are more robust, but will also have the potential to reduce the need for court appeals.<sup>12</sup>

### **(C) Alignment with Government priorities and ensuring broader accountability**

It would be beneficial for the Guidance to articulate how elements of the regime are intended to deliver on CMA priorities and align to the Government's 'missions', including in particular the growth mission, and what actions the CMA is taking to deliver on these specific priorities. The Guidance should also give further details on how the CMA will provide fuller visibility on its approach to digital market regulation in future – we look forward to playing our own role on that assessment in due course.

In December 2023<sup>13</sup> the previous Government set out its expectation for the CMA to be as open as possible about the CMA Board's priorities in relation to the digital regime and the CMA responded to this through its 11 January 2024 "Overview of the CMA's provisional approach to implement the new Digital Markets competition regime". Our understanding of the CMA position is that it will simply continue take into account the Statement of Strategic Priorities and to publish its Annual Plan where the overall priorities are set out.

It is unclear that this provides any further feedback on the CMA's approach to digital markets than what is available for other regimes as things stand. We would suggest that this does not necessarily meet the Government's request for open feedback on digital issues specifically. In this context, and given the heavily-trailed concept that the new regime would be more participative in its approach, it would be helpful for the CMA to guide regime users as to its vision of how the participatory approach will work in practice.

### **(D) Protecting rights of defence (Chapter 5 of the Guidance)**

The Guidance should provide that undertakings which are subject to an investigation for the purposes of SMS designation or other DMU processes, such as conduct investigations relating to the imposition of CRs or PCIs, have access to the file, to allow sufficient visibility of the case against them. It is currently not clear on the face of the Guidance that firms under investigation will get advance notice or any further detail than what is made public. Presumably, firms could get such notice in the context of their ongoing conversations with the DMU, as part of the participatory nature of the intended relationship, but there does not appear to be any commitment to actively provide such clarity by the DMU.

The Guidance notes that it will consider disclosing third party documents to SMS firms, but only in the context of alleged *breaches* of "competition requirements", including CRs and PCI Orders<sup>14</sup>, and then only in the following specific limited circumstances:

- "where the information gathered is not voluminous"<sup>15</sup> it may be practicable to provide copies of third party documents to the firm under investigation, subject to a confidentiality assessment; or

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<sup>12</sup> As recently noted by the Court of Appeal in *Cerelia v CMA*, when assessing decisions by the CMA, the Competition Appeals Tribunal "must exercise informed judgement as to whether the decision under challenge was properly justified by the evidence", including factual and economic material ([paras 37-41](#)).

<sup>13</sup> [Letter to the CMA from the Department for Business and Trade and Parliamentary Under Secretary of State Department for Science, Innovation & Technology, 4 December 2023](#)

<sup>14</sup> [Para 6.3 of the Guidance.](#)

<sup>15</sup> [Para 7.28\(a\) of the Guidance.](#)

- “where the volume of information is considerable”, provide the firm under investigation with one or more of the following:
  - the “gist” of the relevant information and/or copies of the documents directly referred to in the provisional breach finding; and
  - a list of other documents the CMA considers relevant, with the firm being able to make reasoned requests for access to specific listed documents.<sup>16</sup>

It is inappropriate to limit disclosure simply to the “gist” of the case in the context of regulatory interventions which may impose significant restrictions on the commercial freedoms and rights of firms. To understand the case against them and to protect undertakings’ right to defence and ensure a proper opportunity to examine the evidential basis, they need access to the facts on which the CMA is relying. To evaluate the weight of the evidence, it is also important that the parties can assess whether the CMA has asked the right questions of the right third parties.

The Guidance should therefore provide that undertakings subject to an investigation have effective access to materials and evidence, both exculpatory and adverse, subject to appropriate confidentiality protections under s244 of EA02. This should include:

- all the documents and data analysis on which the Board Committee is considering relying upon in its decisions and provisional decisions;
- the fullest possible version of third parties’ submissions, including non-confidential submissions by any complainants or ‘Conduct Requirement-seekers’, anonymised and/or non-confidential versions of third-party questionnaire responses and any supporting documents or other material they rely on, written third-party submissions and transcripts of calls which are used by the CMA when preparing decisions;
- full access to the CMA file, including economic analysis upon which key decisions are made. Such decisions must include “non-decisions”, for example relating to a decisions to not to designate or a decision not to impose a specific CR.

This disclosure needs to take place at a sufficiently early stage in the process so that the parties can assess it and make representations. These could be both on evidence the Board Committee is proposing to rely upon, but also exculpatory evidence on the CMA’s file, before the Committee reaches provisional assessments. Making the overall process more accurate and efficient will ensure that decisions are likely to be more robust, reversals after provisional decisions are less likely, and the potential for appeals will be reduced. This is critical not only as a matter of rights of defence, but also because if investigated parties are able to fully understand the evidence base, they will be able to assist the CMA to reach the right conclusions – in the context of the technically-complex markets the SMS Regime will engage with, this is particularly critical. The disclosure will also enable parties access to the primary evidence sources on which the DMUs conclusions may be based so as to ensure maximum integrity of decision making; it also ensures that rights of defence are fairly protected.

Access to file is well established in the EU (as well as other regimes) and this would contribute to the perception of the UK as being accountable for its transparent process, whether that be with regard to SMS designated parties or third parties taking an interest in designation proceedings.

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<sup>16</sup> [Para 7.28\(b\) of the Guidance.](#)



Enhancing transparency is likely to also assist in limiting the potential for divergent outcomes with other jurisdictions.

It is noteworthy that the Guidance especially provides that relevant evidence gathered in and analysis carried out by other CMA functions, including not just digital but also non-digital cases, may be relied on by and essentially transferred to the DMU, where relevant.”<sup>17</sup> We would note that adopting such an approach is inconsistent with current practice and risks further undermining the firms’ rights of defence.

**(E) Issues to consider in the context of SMS designation and imposition of CRs (Chapter 2 of the Guidance)**

The introduction of any new regulatory requirements has the potential to create additional regulatory overhead, necessitating careful consideration to ensure compliance without compromising operational efficiency. It would be useful for the Guidance to clearly acknowledge this point.

Further below, we have also set out some questions that may be useful for the CMA to consider in implementing the substantive DMCC provisions:

- In situations where business models are at a very nascent stage of development and cannot yet be fully described or explained, and historical data is lacking, it would be helpful to know how the concept of “entrenchment” will be considered and assessed.
- For the purposes of SMS assessment, there must be entrenchment of power *at the time* of designation, but the analysis must be forward-looking (over a 5-year period) and based on developments that would be “expected or foreseeable”, as if the firm were *not* SMS designated.<sup>18</sup> In other words, the SMS assessment needs to be carried out by reference to a counterfactual assuming the firm is *not* designated.

Presumably this means the DMU should be informed by – but not base its analysis entirely on – a backward look. It is unclear how this will apply if competition “for the market” is dynamic and opportunities for shifts in power are likely to come in x-number of year cycles due to exponential innovation. Here, it would be helpful to have specific acknowledgement that, in making its assessment, the DMU will take disruptive innovation into account. The Guidance should also:

- explain how the assessment of the evidence in conducting this prospective, counterfactual analysis will be performed;
- explain how will the evidence relating to entry/expansion will be weighed up and if/how this will differ from assessments in other contexts (i.e. mergers); and
- be sufficiently flexible to recognise that market developments can differ significantly, depending on the nature of the digital activity.

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<sup>17</sup> [Para 2.65 of the Guidance.](#)

<sup>18</sup> [Chapter 2 Section 5 of the Guidance.](#)

- As with the [Merger Assessment Guidelines](#), there is a broad margin of appreciation on how evidence will be assessed – on “the balance of probabilities”.<sup>19</sup> It would be helpful for the Guidance to describe the proposed approach for weighting up different types of evidence in relation to future developments in an ex ante assessment on “the balance of probabilities”.
- The Guidance says that “‘substantial’ refers to the extent of market power, while ‘entrenched’ ensures any such market power is not transient and is unlikely to be competed away over a forward-looking period of five years”<sup>20</sup>, but a few paragraphs later<sup>21</sup> it provides that where there is a finding of significant power, this will support a finding of entrenchment. Paragraph 2.42 correctly identifies “substantial” and “entrenched” as distinct legal concepts - each of these needs to be individually assessed and proven for the SMS designation test to be met under a correct interpretation of the DMCC. It would be helpful for the Guidance to retain this clarity and not seek to link the two tests.
- The Guidance should clarify how time horizons would apply to different digital activities supplied by the same firm.
- The approach of SMS revocation working in practice should be explained, especially where the market changes or evolves, and the firm no longer meets the SMS criteria.
- The Guidance provides that “[i]f 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”<sup>22</sup>. It is unclear how this decision is intended to be made. The definition and approach of assessing “significantly diminished” should also be clarified.
- The Guidance should clarify how the DMU intends to approach a situation where it might perceive a need to designate quickly, but technological and/or market dynamics mean the potential concerns are resolved before CR/PCI intervention have any effect.

The CMA will therefore need to be innovative in its design/practical implementation of interventions and have meaningful discussions with relevant stakeholders along the way. Doing this effectively and proportionately will be time- and resource-intensive and should be factored into the CMA’s initial assessment on whether to begin the SMS designation process in the first place. For example, an active “wait and see approach” designed to assess the real impact (success) of first the CRs, before then imposing CRs on further SMS firms, could be a useful strategy.

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Microsoft looks forward to continuing to engage productively with the CMA as its considerations of the new regime develop.

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<sup>19</sup> [Para 2.67 of the Guidance.](#)

<sup>20</sup> [Para 2.42 of the Guidance.](#)

<sup>21</sup> [Para 2.52 of the Guidance.](#)

<sup>22</sup> [Paras 2.46-2.52 of the Guidance.](#)