News Media Association Response to the Competition and Markets Authority Consultation on the Digital Markets Competition Regime Guidance

About the News Media Association

The News Media Association (the "NMA") is the voice of UK national, regional and local news media in all their print and digital forms - a £4 billion sector read by more than 46.2 million adults every month. Our members publish around 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger, and the Monmouthshire Beacon.

Summary

The NMA broadly welcomes the Digital Markets Competition Regime Guidance (the "Guidance") as a well-drafted, coherent guide to how the Competition and Markets Authority (the "CMA") will exercise its powers under the digital markets competition regime established by Part 1 of the Digital Markets, Competition and Consumers Act (the "DMCCA").

The Guidance is drafted in a manner entirely appropriate to a forward-looking regime, with flexibility, adaptability, and responsiveness at its core. This is essential if the CMA is to regulate fast-moving digital markets effectively and to apply its new powers to the diverse range of business models employed by potential SMS firms. We strongly encourage the CMA to maintain this flexible, adaptable, and responsive approach as it finalises the Guidance.

Narrowing the scope of the powers given to the CMA by the DMCCA; tying the regulator to unnecessary procedural activities; or applying an unduly rigid approach to its regulatory tasks would severely hamper the regulator's ability to drive innovation and growth in digital markets for the benefit of consumers. In the table below, we set out many areas where we agree with the approach taken in the Guidance.

Whilst, in large part, we agree with the approach taken in the Guidance, there are some areas where useful clarifications or changes could be made in order that the new regime is as effective as possible. The most important of these changes are:

1. In several areas, ensuring that third party views are sought and accounted for in the CMA's decision-making processes, and that there is as much transparency as possible regarding the CMA's decision-making processes. This will be essential in ensuring that the CMA prioritises interventions that will have the most impact for consumers, and ensuring that the participative approach favoured by the CMA is successful.
2. When considering consumer benefits as CRs are created, the Guidance should make clear that the interests of citizens more broadly can and will be taken into account. Many CRs could both directly benefit the consumer of a service in economic terms, whilst also having substantial synergies with benefits to citizens.
3. In determining the appropriate form of a CR, whilst we appreciate that an outcomes-based CR may be preferable, the CMA should consider all options (including a more prescriptive, action-based CR) as a matter of course. The implementation of the EU Digital Markets Act has demonstrated that broad high-level requirements can give SMS firms the scope to evade the spirit and letter of the law. It is better to set a more specific CR in the knowledge that it may need to be updated more regularly than to set something so flexible that it will give agency to SMS firms to evade compliance.
4. When a CR has an implementation period, the CMA should state that it will make short-term interim CRs – to be included in the main CR - that prevent an SMS firm from taking any action that will impede the effectiveness of a CR before it comes into force.
5. It should be clearly stated that behavioural remedies applied through a PCI overlap with the remedies that could also be applied through a CR. This is important, as CRs will be a more agile and swift power, and the CMA should not be limited in their ability to use CRs to place significant behavioural requirements on SMS firms.
6. Equally, it is right that the CMA is not taking a 'stepped approach' to implementing CRs and PCIs; the regulator should be ready to use PCIs at the outset. For many issues in digital markets, PCIs will provide the only, or by far the most effective remedy.
7. The CMA should not delay enforcement unduly in the expectation that SMS firms will directly engage in good faith with third parties, and should recognise that in many instances a participative approach will simply not be appropriate.
8. With regards to the FOM, given that a CR of the type allowed under 20(2)(a) is unique in having the FOM as a backstop, the Guidance should make clear that CMA will sometimes expedite its standard enforcement processes for 20(2)(a), for example, if an SMS firm is simply refusing to engage with a third party.
9. When considering if a breach of an EO related to 20(2)(a) could be satisfactorily addressed within a "reasonable timeframe" by exercising one of its digital markets functions other than the FOM, the Guidance should – given that the FOM has a six-month

time limit – make clear that the CMA will generally not consider a timeframe significantly longer than six months to be reasonable.

10. When considering if third parties should be allowed to negotiate collectively under the FOM, the CMA should also have regard – and this should be the principal consideration – as to whether the third parties wish to be 'joined third parties'/'grouped third parties'.

As the CMA has made clear in its Online Platforms and Digital Advertising Market Study; its Mobile Ecosystems Market Study; and its advice to DCMS (as it was then) on how a code of conduct could apply to platforms and content providers, the new digital markets regime will play a critical role in governing relationships between platforms and news media publishers.

We welcome the approach taken in the Guidance, which we believe will allow the remedies already set out by the CMA to be implemented effectively. We hope that the CMA and Secretary of State will act swiftly to finalise the Guidance and necessary Statutory Instruments so that the pro-competition regime will become operational as soon as possible.

Please see the table below for a detailed analysis of the Guidance. We would be happy to discuss our response in greater detail.

Paragraph(s)	Guidance	NMA Response
Strategic Market Status		
Identifying a digital activity		
2.10; 2.43	When identifying a digital activity and the products it may comprise, the CMA will focus on "factual information and will not require an assessment of the competitive constraints on the firm", which is "distinct from a formal market definition exercise". Therefore, the CMA is not required to define a relevant market when assessing SMS. The CMA notes that a formal market investigation exercise often involves "drawing arbitrary bright lines indicating	This flexibility is positive and necessary to allow the CMA to regulate fast-moving digital markets. A binary judgement on which products fall in or out of scope would be inappropriate as it would risk ignoring the nuanced and highly interrelated nature of products in the digital economy, whilst underestimating the importance of dynamic competition. A formal market definition would make it difficult to consider interactions between

	which products are 'in' and which products are 'out'". The CMA's assessment will instead focus on "competitive constraints".	a complex ecosystem of products, which are common in digital markets. Further, the relevant evidence that the CMA sets out to assess can be analysed and interpreted without formally defining a relevant market. Market shares can also be calculated on multiple different bases and interpreted without a market definition. This approach will also prevent unnecessary duplication that would occur if the CMA assessed evidence when the market is defined, and again when assessing whether a firm has SMS.
2.11	The CMA "may vary its approach between investigations depending on the particular circumstances of a case".	This flexibility is necessary to allow the CMA to account for the significant divergence between different services provided by Big Tech firms.
2.13	The DMCCA sets out that the CMA may treat two or more potential SMS activities as the same activity when "(a) these have substantially the same or similar purposes or (b) these can be carried out in combination to fulfil a specific purpose." The CMA will interpret the conditions "broadly" and will "decide on the facts of the case". The concept of "purpose" could "relate to customer needs or preferences rather than technical complementarity".	A too narrow interpretation of DMCCA 3(3) could see the CMA ignore important synergies and interconnections between digital activities. This would make designations far less effective in tackling anti-competitive conduct and create a greater threat of anti-competitive leveraging. Therefore, it is right that the DMCCA 3(3) conditions will be interpreted broadly. For example, organic and paid-for search results represent different services but are presented on the same webpage. Equally, several different ad tech products can form a single supply chain.

		The CMA is right to acknowledge that customer needs and preferences can be as relevant as technical complementarity. This will ensure that there is a focus on how a firm operates in practice and how products interact (rather than trying to separate products by market as is done in traditional competition law). The Guidance could also consider instances in which the CMA considers that it is not appropriate to group activities, but where the activities may be subject to complementary CRs that will impact one another. The Guidance should acknowledge that there may be utility in designating these activities at the same time/in parallel in order to ensure that the CRs are as coherent and effective as possible (as well as creating efficiencies in the assessment process). An example of two services that could be designated in parallel are Google Search and Google's Ad Tech services.
Jurisdiction and turnover		
2.20	When assessing if a firm has a "significant number of UK users" - DMCCA 4 - the CMA defines a "UK user" as "any user of the relevant service or digital content, including consumers or business users who it is reasonable to assume (a) in the case of an individual, is normally in the United Kingdom, and (b) in any other case, is established in the United Kingdom".	The Guidance should clarify that the definition of a UK user encompasses a business that is based in another jurisdiction but "carries on business" in the UK. Otherwise, the definition could risk excluding a potentially significant portion of businesses that use a digital activity in the course of their UK operations.
2.21	When assessing if a firm has a "significant number of UK users" – DMCCA 4 – the CMA states that "the assessment of whether the number of UK users is 'significant' is context	It is right that the Guidance is drafted in this way. as it may be that a firm is dominant in a service that is not used by a huge portion of the population, but the fact that

	specific." The assessment may consider "the number of UK users it has relative to other undertakings".	it is the most used service of its type still gives it significant influence. This may be particularly important for services that utilise a fast-developing technology – such as AI - with a relatively small number of users in the UK as a whole, but which have swiftly become dominant in the existing pool of users.
2.22	When assessing if a firm "carries out the digital activity carries on business in the United Kingdom" – Section 4 – the CMA does "not require the undertaking to have a place of business in the UK", as per the EA02 and case law.	It is right that the Guidance acknowledges this, as firms that have a significant impact on the UK by carrying out business there should not be able to avoid designation simply by lacking a place of business in the UK.
The Strategic Market Status conditions		
2. 28; Footnote 19; 2.29; 2.30	The CMA sets out how it will assess relevant turnover.	As a quantitative measure, the calculation of turnover should not give rise to significant debate or dispute during the designation process. Therefore, it would be sensible for the CMA – dependent on the Statutory Instruments that the Government will introduce under Section 8 for the purposes of calculating turnover – to use the same methodology as the European Commission Consolidated Jurisdictional Notice on the calculation of turnover, as this is generally recognised as the gold standard internationally.
2.40; Footnote 28; 2.41	The CMA notes that market power is not limited to raising prices profitably, but is also relevant to "worsening quality, service, business models and innovation, among others". This means that "market power is relevant even where customers or users face a zero price".	It is right that the Guidance takes a broad view of market power and evidence on the sources of market power. A narrow approach would risk failing to capture a great deal of the market power held by potential SMS firms.

	Therefore, the CMA states that "an assessment of market power is largely an assessment of the available alternatives", including "possibilities for entry and expansion" in the future. The CMA sets out broad examples of indicators that may provide evidence of market power, and will also consider "evidence on the sources of market power".	
2.45; Footnote 31	The CMA will not "typically seek to draw on case law relating to the assessment of dominance", as "substantial and entrenched market power" is distinct from the concept of "dominance" used in competition law enforcement cases. "However, the CMA may have regard to the underlying evidence and analysis from the CMA's investigations under the CA98 (or the CMA's other tools) to the extent it is relevant to the extent and persistence of the potential SMS firm's market power (rather than any specific finding of 'dominance')."	Given that this is a novel regime, it is correct that the CMA does not draw on case law. The Guidance provides sufficient clarity that the CMA will only use underlying analysis and evidence from CA98 investigations, rather than blurring the two legal concepts of SMS and dominance.
2.47; 2.48	When making a forward-looking assessment of substantial and entrenched market power, the CMA's starting point will be the market conditions and market power at the time of the SMS investigation. It will then consider any "expected or foreseeable" developments; uncertainty as to the future evolution of a sector will not stop the CMA from making an assessment "based on the evidence available to it".	It is right the CMA only make an assessment based on available evidence, rather than having to make a 'crystal ball' assessment of the state of the sector in five years' time, and that it only considers realistic possibilities rather than accounting for every single conceivable possible permutation. Otherwise, SMS designations could be stymied by wholly speculative claims about the possible development of a sector.
2.49	The CMA will account for regulatory developments when making a forward-looking assessment.	It is important that the CMA does not delay making an SMS designation based on possible legislation or

		regulatory intervention that is not imminent and/or still in development. There will be multiple potential forms that future digital regulation could take, with the Government or regulators conducting consultations on multiple options for interventions that may well never come to fruition. The Guidance could clarify that regulatory developments will be more likely to have an impact on an assessment of "substantial and entrenched market power" if it is well advanced and there is a very high degree of certainty as to its form and impact.
2.50	When considering the potential market and regulatory developments set out in 2.49, the CMA will not seek to make precise predictions about the development of an industry.	It is right that the CMA does not seek to make precise predictions, as this would sap resources and be highly speculative, with very little value in assessing substantial and entrenched market power.
2.51; 2.52	When making a forward-loving assessment of substantial and entrenched market power, the CMA will "consider the extent to which the firm's market power has persisted in the past, including whether that market power has endured through previous market developments." Therefore, when there is no clear and convincing evidence that recent developments that will dissipate a firm's market power, evidence of substantial market power will support a finding that the power is entrenched.	It is right that the CMA takes this approach, as the persistence of market power in the past offers a strong indication of the likelihood of market power persisting in the future, particularly when it is hard to assess the impact of uncertain future developments. It is right that the CMA assumes that substantial market power will endure absent evidence to the contrary.
2.53	When making a finding of strategic significance, the CMA only needs to find that one of the four conditions set out in the Act has been met.	Whilst this is clearly the right approach to make the designation assessment as efficient as possible, the CMA will use the evidence gathered in an SMS designation when creating CRs (3.22).

		Therefore, the Guidance could note that there may be utility in finding that more than one of the conditions has been met to better facilitate the setting of appropriate CRs.
2.54	The examples given by the CMA when setting out each condition of strategic significance are not exhaustive.	It is right that the CMA retains flexibility over how it will assess strategic significance, given the fast-moving nature of digital markets and the diverse business models of potential SMS firms and their services.
2.56	When assessing whether a firm has "achieved a position of significant size or scale", the CMA notes that the "most appropriate metric (or combination of metrics) is likely to depend on the specific context."	This flexible approach is correct. For example, for a social media platform that is free to access, the number of users and time spent on the platform will be relevant, whereas the number of purchases will be more relevant for an app store or online marketplace.
2.57; Footnote 36; 2.59	When assessing whether a firm has "achieved a position of significant size or scale" or whether "a significant number of other firms use the digital activity" the CMA notes that there is "no quantitative threshold" and that this may be assessed in terms of the firm's position "relative to other firms". When assessing whether a firm has "achieved a position of significant size or scale", the CMA may also account for "the firm's size relative to the potential number of users".	This is the right approach, as it ensures that a firm's strategic position within a specific market will make it eligible for SMS designation, as opposed to only finding SMS if a significant portion of UK businesses/consumers use the service overall. A more restrictive approach, based only on a firm's absolute position, would fail to capture many instances of a firm having a strategic position, rendering the designation process ineffective.
2.61	When assessing whether a "firm's position in respect of the digital activity would allow it to extend its market power to a range of other activities", the CMA will assess the firm's "ability", rather than predicting a firm's conduct or assessing its incentives.	This is the correct approach, as it is the very existence of the firm's ability to extend its market power that is a good indication that the effects of a firm's market power are particularly significant and widespread.

		Therefore, assessing a firm's incentives would likely be extremely resource incentive but ultimately unnecessary in assessing whether a firm has a strategic position.
2.63; 2.64	When assessing SMS evidence, the CMA will not have a prescriptive list; the balance of quantitative vs. qualitative evidence will vary across investigations. There is no hierarchy of evidence and no quantitative thresholds.	This is the correct approach, as a range of different factors could inform the SMS assessment, so the different factors contributing to the test cannot be considered in isolation and should be assessed together to reach an overall view.
2.65	The CMA will be able to draw on market studies or cases under its digital markets functions when assessing SMS, whilst considering the extent it should be updated or corroborated.	It is right that the CMA can use existing evidence to build its case, creating substantial efficiencies in the designation process.
2.66	The assessment of substantial and entrenched market power could inform the assessment of a strategic position.	It is right that the designation assessment is a coherent process, with the synergies between each assessment recognised to create efficiencies in the process.
2.67	An assessment of SMS will be on "the balance of probabilities, and based on an in-the-round" assessment.	Making an assessment to the ordinary civil standard – on the balance of probabilities – is appropriate. An in the round assessment is appropriate given that it will necessarily be an assessment of factors that cannot be quantified precisely, with a blend of different evidence.
Procedure of a Strategic Market Status investigation		
2.68	To assess whether there are "reasonable grounds" to launch an SMS investigation, there are a range of information sources that the CMA may consider.	The list of information sources does not include third party complaints or requests. This is a significant lacuna, given that third parties will be very well placed to provide information that could give the CMA reasonable grounds to launch an SMS investigation.

		The Guidance could state clearly that evidence from third parties, such as challenger firms, could provide the basis for the CMA to launch an SMS investigation.
2.69	The CMA will have regard to its Prioritisation Principles when considering which firms to prioritise for SMS investigations.	It may be appropriate for the CMA to set out in greater detail the factors that may cause it to prioritise a designation, particularly given that the Prioritization Principles (and the Strategic Steer to which the Principles refer) are designed to be applied to the CMA as a whole, whilst the DMU regime is focused on a subset of the most powerful firms.
2.74	The description of digital activity to which the SMS investigation relates will not contain an exhaustive list of products, and the onus will be on the SMS firm to assess which products are in scope.	Given the fast-moving nature of digital markets, it is right that the description of a digital activity is not unduly prescriptive, as this could leave relevant products out of scope and not subject to relevant competition requirements (as well as undermining the impact of the competition requirements on the products defined as in scope).
2.83	When the CMA consults on a proposed SMS designation decision, the firm subject to the SMS investigation will have the opportunity to make oral representations on the findings set out in the proposed decision.	The Guidance should also state that the key third parties will also have the opportunity to make oral representations, as this will provide the CMA with key evidence that it would likely not receive from the SMS firm.
2.112	An SMS firm can make representations to the CMA that it should make an early further SMS designation. In order to appropriately manage resources, the CMA will not consider evidence submitted by a firm within 12 months of declining a previous request.	It is right to prevent the CMA's resources being unduly diverted to considering frequent requests for the review on designations. In addition, the CMA could also clarify that it will not use its discretion to review a designation in the first two years of a designation decision being made, given it will have only recently designated a firm and the competition

		requirements will likely not have had time to have a significant impact.
Conduct requirements		
Imposing conduct requirements		
3.10; 3.23; 3.28	The CMA must consider benefits to consumers before imposing a CR. In considering what a CR or combination of CRs is intended to achieve, "the CMA will have regard in particular to achieving benefits for consumers". When assessing whether a CR is likely to be effective, the CMA will have regard to "the likely impact of the CR(s) in addressing the concern identified by the CMA, including benefits for consumers that are likely to result (directly or indirectly) from the CR(s)".	It is right that the CMA acknowledges that that consumer benefits can result indirectly. For the avoidance of doubt, the Guidance should clarify that there is no hierarchy between direct and indirect benefits, and the CMA will not prioritise direct benefits when imposing CRs. The CMA's Guidance should make clear that consumer benefit is not limited to a narrow understanding; the interests of citizens more broadly can and should be taken into account. Indeed, whilst the CMA must have particular regard to consumer benefits before imposing a CR, the legislation does not limit the regulator to only implementing CRs which an immediate consumer benefit. The Guidance should make this clear. It is important that digital markets support the interests of UK citizens), respecting wider rights and benefits such as free speech and a plural information ecosystem. Many CRs could both directly benefit the consumer of a service in economic terms, whilst also having substantial synergies with benefits to citizens. If the CMA only considers consumer benefits in isolation, the potential benefits of the new regime will be severely limited.

		For example, a CR which benefits the consumers of news content on online platforms, and the news media businesses which create such content, will also have wider impacts on the millions of people who may not directly consume the content, by supporting a democratic society and holding Government to account.
3.11	The CMA will have regard to its Prioritisation Principles when considering CRs.	This may not provide adequate detail on which interventions the CMA will prioritise, for similar reasons as set out for 2.69 above.
3.13	Under DMCCA 20(3)(c) the CMA may impose CRs for the purpose of preventing an SMS firm from carrying on activities other than the relevant digital activity in a way that is likely to materially increase the SMS firm's market power or materially strengthen its position of strategic significance in relation to the relevant digital activity. The CMA states that this "would include requirements to prevent the SMS firm from carrying out non-designated activities in a way that is likely to reinforce or embed such market power and/or position of strategic significance".	It is correct that 20(3)(c) can encompass activity that reinforces or embeds an SMS firms' dominance (as opposed to only activity that expands its market share). Otherwise, 20(3)(c) could fail to capture a great deal of anti-competitive leveraging. This will be particularly important in instances where anti-competitive leveraging is taking place, but the CMA considers that the firm's market power is so strong that it is difficult to envisage its market share growing any further, for example when a Search Engine already holds 90% of the paid search ad market.
3.17	The CMA will consider the proportionality of CRs after it has identified the aim of a CR and what CRs it could impose.	This is right, as considering proportionality at an earlier stage would use an inordinate amount of resource and potentially obscure the focus on finding the most effective CR.
3.26	The CMA will apply four principles when it considers potential CRs.	Whilst it makes sense for the CMA to set outcome-based/action-based and higher level CRs where possible, this should not be the default option, and the CMA should start each CR decision with all options on the table.

		We do recognise that outcomes based/action-based higher level CRs are more likely to be future proof, but this must not come at the expense of compliance. It also must be recognised that if an action-based CR is overly prescriptive e.g. preventing a very particular behaviour, it could allow an SMS firm to evade compliance by changing its behaviour slightly. However, as has been seen in the EU as the Digital Markets Act has come into force, broad high-level requirements can give SMS firms the scope to evade the spirit and letter of the law. Therefore, we are not advocating for more prescriptive CRs as a general principle, but simply stating that all options should be on the table – and considered as a matter of course – at the outset.
3.26; 3.27	The CMA states that it will be more likely to impose more detailed CRs when a firm has failed to comply with higher-level requirements and/or when they have identified clear and persistent existing issues which need to be corrected. The CMA also stated that while in some cases it may be appropriate to move sequentially through the four principles, there may be situations where a more directive approach is needed from the outset.	Again, beginning with an outcome-based CR – whilst it may be appropriate in many cases – should not be seen as the default option, as it risks weighting flexibility for SMS firms ahead of compliance. The CMA is right to note that a more directive approach may be merited from the outset, and the Guidance should clarify that this approach will always be considered from the outset.
3.28	When considering if a CR will be effective the CMA will consider the timescale over which it will be achieved.	Whilst timeliness is an appropriate factor to consider, the CMA should recognise that the CRs which will be most effective in the long term may axiomatically take longer to bed in. Therefore, timeliness must be balanced properly with other factors, with the long-term impact on consumers (direct or indirect) taking precedent.

3.28	When considering if a CR will be effective, the CMA will consider the extent to which a CR is sufficiently flexible.	The CMA could also balance this with an assessment of whether a CR is sufficiently detailed to ensure effectiveness and prevent SMS firms evading compliance, particularly given that CRs can be updated. It is better to set a more specific CR in the knowledge that it may need to be updated more regularly, than set something so flexible that it will give agency to SMS firms to evade compliance.
3.28	The CMA sets out a range of factors it will account for when assessing if a CR is likely to be effective in achieving its intended aim.	Given the fact that there is ample evidence of potential SMS firms evading the spirit and letter of the competition requirements placed on them in comparable regimes – such as the EU Digital Markets Act – the CMA should consider previous breaches of competition requirements (whether in the UK or internationally), and the potential for obstruction by SMS firms when assessing if a CR will be effective. This will help ensure that the CMA will not implement CRs of a kind that have already been flouted by SMS firms.
3.28; 3.29	When considering if a CR will be effective, the CMA "may" take into account actions by other regulators or legislators internationally.	The consideration of actions by other regulators or legislators should be placed in the list of factors in 3.28: the success of action taken by jurisdictions internationally, such as those imposed under the EU Digital Markets Act, will provide vital evidence as to the likely success of CRs and should be considered as a matter of course.

3.31	The CMA sets out the effects of a CR or combination of CRs it will consider when making an assessment of the proportionality criteria set out in 3.30. This includes "effects on the SMS firm, including the extent to which the SMS firm will need to make changes to its technical systems and/or business model, and whether this is the result of the SMS firm's previous conduct or decisions".	To inform a decision on whether the effect of a CR or combination of CRs on an SMS firm is proportionate, the CMA should consider the effectiveness of, or previous breaches of comparable competition requirements by the same SMS firm (whether in the UK or internationally). Evidence of breaches of comparable competition requirements will provide crucial context as to whether a CR is proportionate, particularly for more onerous remedies.
3.32	When considering proportionality, the CMA will "not typically seek to quantify these effects precisely, but consider their magnitude in the round, having regard, as relevant and appropriate in each case, to the quantitative and/or qualitative evidence available." "In some cases, the CMA's assessment will necessitate weighing effects of the CR(s) expected to be felt in the short term (eg upfront costs), against others expected to arise in the future (eg benefits from innovation). In these circumstances, the CMA will take into account the likelihood and magnitude of each and assess them accordingly."	Given the broad range of evidence and different factors involved in an assessment of proportionality, it is right that the CMA makes an in the round assessment. It is right that the CMA recognises that short term costs will sometimes be necessitated to achieve long term benefits from CRs; this will be essential in ensuring that the CMA sets CRs that will drive durable, long term change in digital markets.
3.34; 3.45	The development of CRs can run in parallel with an SMS investigation or PCI investigation, and consultations can take place in parallel.	In the interests of efficiency, it is right that CR assessments can take place in parallel with SMS investigations.
3.53	The CMA may publish Interpretative Notes to accompany a CR.	Whilst the Interpretative Notes are necessary and useful, the CMA should ensure that it does not give SMS firms an opportunity to evade compliance by putting prescriptive

		detail that may be better placed in the CR itself into an Interpretative Note. Whilst the Notes are non-binding, the CMA should make clear that it can take the Notes into account when investigating a CR breach and issuing penalties. It should also be made clear that the Notes are not exhaustive in terms of behaviour necessary to comply with a CR, and an SMS firm could still breach a CR even if it fulfils all the behaviours set out in the Notes.
3.59; 3.63	The CMA may provide a period of time between the date that it imposes a CR and the date the CR comes into force. The CMA states that it expects the SMS firm to "work constructively with the CMA" when a CR has an implementation period.	There is a danger that an SMS firm may use an implementation period to take steps which will impede its compliance with the CR. The CMA should state that it will make short term interim CRs – to be included in the main CR - that prevent such action before the 'main' CR comes into force, or state clearly that it will take swift enforcement action when it considers that an SMS firms' lack of compliance is in part due to action it took after the CR was imposed, but before it came into force. The CMA could construct 'boiler plate' short term interim CRs, a tailored version of which imposed as a matter of course when there is an implementation period for a CR. The CMA could also require the SMS firm to make Progress Reports on implementation, ensuring that SMS firms engage constructively.

3.85	When considering revoking a CR, the CMA will "have regard where appropriate to investments that firms and relevant third parties may have made in reliance on the CR."	This is right, as third parties may have made significant investments to take advantage of a more competitive market.
Pro-competitive interventions		
Assessing whether there is an adverse effect on competition		
4.3	The CMA notes that there will be divergence from the current market investigations regime.	Given the novel nature of the new regime, the CMA is right to note that the PCI approach will be different in places. Too close an adherence to existing regimes risks not utilising the unique nature of PCI powers.
4.7	When assessing an AEC, the "CMA is not required to state whether particular factors are to be considered structural or related to a firm's conduct, provided that they fall within at least one of these categories".	It is right that the CMA is not required to define whether the factors are structural or related to the firm's conduct, as it may well be that it is a combination of the two that is difficult to precisely delineate, and the distinction is not relevant in finding that there is an AEC.
4.8	"The meaning of 'prevents, restricts or distorts competition' in the Act is a broad concept, covering any adverse effect on competition in connection with the relevant digital activity in the UK, whether actual competition or potential competition. The CMA will therefore consider factors that affect potential competition (for example, by preventing entry and/or expansion) as well as current competitive conditions."	This is the correct interpretation of the Act, which is intended to create a forward-looking regime, and will allow the CMA to address an AEC in emerging markets such as the AI market.
4.9	"The assessment of whether there is an AEC does not require the CMA to define a relevant market."	This flexibility is positive, and necessary to allow the CMA to regulate fast moving digital markets. A binary judgement on which products fall in or out of scope would be inappropriate as it would risk ignoring the nuanced and highly interrelated nature of products in the digital economy, whilst underestimating the importance of dynamic competition. A formal market definition would make it difficult to consider interactions between

		a complex ecosystem of products, which are common in digital markets. Further, the relevant evidence that the CMA sets out that it will assess can be analysed and interpreted without having formally defined a relevant market. Market shares can also be calculated on multiple different bases and interpreted without a market definition. This approach will also prevent unnecessary duplication, as otherwise the CMA would have to assess evidence when the market is defined, and again when assessing whether there is an AEC.
4.10	In assessing an AEC, "the CMA will not however seek to describe, in detail, the competitive conditions that could prevail in those circumstances."	This is right, as it would put an unnecessary burden on the CMA to speculate on the precise market conditions that could occur absent the AEC.
4.13; 4.14	When assessing an AEC, the CMA will consider any competition enhancing efficiencies that have resulted, including "whether there are other (potentially less restrictive) ways these efficiencies could be achieved."	Considering if there other, less restrictive ways efficiencies could be achieved is crucial, as SMS firms should not be able to evade the finding of an AEC by claiming that their anti-competitive conduct creates efficiencies even if this conduct is not necessary for the efficiencies to be achieved. The CMA should state clearly that - in a case where the efficiencies outweigh the adverse effects on competition but the efficiencies could be achieved through other means - it can make a PCI which targets the AEC whilst preserving the efficiencies.

		In 4.39 the CMA states that "It is possible that some benefits are of such significance compared with the extent of the AEC that the CMA may decide not to impose a PCI. This might occur if no PCIs are identified that are able to preserve the benefits while also remedying or mitigating the AEC." Generally, this should be the only circumstance in which the CMA does not make an AEC finding due to beneficial efficiencies. This assessment should be relatively simple to make, given that the CMA will consider remedies alongside an AEC assessment.
4.15	When assessing an AEC, the CMA states that it "will have regard to requirements that are already in place on the relevant SMS firm or soon to be implemented and the extent of their effectiveness in impacting any potential AEC."	The CMA should make clear that, even if a CR is having a positive impact in terms of reducing an AEC, it should consider the market as if the CR were absent, as a PCI may be more effective in creating a more competitive market in the long term. In short, effective CRs should not preclude the imposition of a PCI.
4.17	The CMA states that factors giving rise to an AEC may relate to a digital activity outside the relevant digital activity, provided it is linked to the relevant digital activity.	This is positive, and analogous to the DMCCA 20(3)(c) CR (whilst going further in accounting for leveraging from a designated to a designated position, although this is accounted for in other CRs). Otherwise, the CMA's powers would be constrained by the SMS designation, failing to account for anti-competitive leveraging.
4.19	"The CMA does not have a prescriptive list of evidence that it will take into account when assessing whether there is an AEC and its methods and approaches will reflect the specifics of each case."	It is right that the CMA does not have a prescriptive list of evidence, as the varied nature of Big Tech business models will necessarily mean that AEC factors will vary from case to case.
Identifying an appropriate pro-competitive intervention		

4.20	The CMA will consider the proportionality of a PCI after it has identified the aim of a PCI and what PCIs it could impose.	This is right, as considering proportionality at an earlier stage would use an inordinate amount of resource and potentially obscure the focus on finding the most effective PCI.
4.25	"In designing an appropriate PCI, the CMA maintains broad discretion on the type of remedy which it chooses to impose."	It is right that the CMA retains broad discretion on remedies, given the myriad permutations of AECs that it may be required to remedy. Any constraint in the Guidance could severely hamper the CMA.
4.29	The CMA sets out a range of behavioural remedies that can be imposed under a PCI (having also set out structural remedies).	The structure of the Guidance means that in 3.7 the statutory list of CR remedies is set out without allusion to the way that they may be applied in practice, whereas the range of potential behavioural PCI remedies are set out in more detail. There is a danger that this will lead to a misunderstanding: that the types of behavioural PCI remedies set out in 4.29 can only be applied through a PCI, when this is clearly not the case under the legislation. Therefore, it should be clearly stated that behavioural remedies applied through a PCI overlap with the remedies that could also be applied through a CR. This is important, as CRs will be a more agile and swift power, and the CMA should not be limited in their ability to use CRs to place significant behavioural requirements on SMS firms.
4.31	When considering if a PCI will be effective the CMA will consider the timescale over which it will be achieved.	Whilst timeliness is an appropriate factor to consider, the CMA should recognise that the PCI which will be most effective in the long term – by effecting significant

		structural change in a market – may axiomatically take longer to bed in. Therefore, timeliness must be balanced properly with other factors, with the likely impact on consumers (direct or indirect) taking precedent.
4.31	The CMA sets out a range of factors it will account for when assessing if a PCI will be effective in meeting its purpose.	Given the fact that there is ample evidence of potential SMS firms evading the spirit and letter of the competition requirements placed on them in comparable regimes – such as the EU Digital Markets Act – the CMA should consider the effectiveness of, or previous breaches of competition requirements (whether in the UK or internationally), and the potential for obstruction by SMS firms when assessing if a PCI will be effective in meeting its purpose. This will help ensure that the CMA will not implement PCIs of a kind that have already been flouted by SMS firms, or that have already proved ineffective.
4.35	The CMA sets out the factors it will account for when assessing the proportionality criteria for a PCI set out in 4.34.	To inform a decision on whether a PCI is proportionate, the CMA should consider the effectiveness of, or previous breaches of comparable competition requirements by the same SMS firm (whether in the UK or internationally). Evidence of breaches of comparable competition requirements will provide crucial context as to whether a PCI is proportionate, particularly for more onerous remedies.
4.35	When considering proportionality, the CMA will "consider their effects in the round".	Given the broad range of evidence and different factors involved in an assessment of proportionality, it is right that the CMA makes an in the round assessment.

Pro-competition intervention procedure		
4.41; [Also highly relevant for 3.11 and 3.12]	When considering the basis for launching a PCI investigation: "The CMA will have regard to its Prioritisation Principles when considering whether and how to address issues in relation to a relevant digital activity."	It is positive that this is precisely the same language used in 3.11, in relation to the CMA's decision to impose a CR. Furthermore, 3.12 states: "The CMA may consider whether to impose or vary a CR (or combination of CRs) to address an issue and/or whether to launch a PCI investigation. In such cases, the CMA will select what it considers to be the most appropriate tool(s) having regard to all the relevant circumstances. This may include considering the nature and scope of the issue(s) under consideration, the nature, scope and purpose of potential interventions, and the statutory conditions that must be satisfied in relation to each tool." Taken together, these parts of the Guidance give a useful indication that the CMA is not choosing to take a 'stepped approach' to regulation i.e. imposing a CR to address a particular issue as a matter of course, and then employing a 'wait and see' approach before considering a PCI. This is important, as for many issues in digital markets, PCIs will provide the only, or by far the most effective remedy. For example, in the digital advertising market, the European Union is considering structural remedies in relation to Google's ad tech businesses which could only be achieved in the UK digital markets regime through a PCI. The CMA should be ready to utilise PCIs from the outset of a designation (and in parallel with an SMS

		investigation), and should not be restricted in its use of remedies. It should also be noted that the structural remedies that can be implemented through a PCI have key advantages over behavioural remedies, with the latter being hard to monitor and often requiring regular updates in order to keep pace with technological innovations. A 'wait and see' approach, or an inclination to set weaker remedies and only use stronger remedies after an SMS firm's market power has become more entrenched, is an approach which has already been seen to fail. It is what has allowed the proliferation of the highly concentrated, monopolised markets which this very regime is intended to address. The CMA must not make this mistake as it discharges its new powers. Whilst we are clear that the CMA should not be constrained in its choice of remedies - given that some of the most effective competition remedies will only be available through a PCI - when the CMA (as per 3.12) is considering whether to impose a CR or launch a PCI investigation, and its likely desired remedy could be achieved via a CR or PCI, the CMA should have particular regard of the timeliness of the remedy. This is crucial, given that CRs will generally be put in place more swiftly than a PCO. To note, the CMA will have to consider the timeliness of CRs and PCIs when considering their effectiveness (3.28 and 4.31), so it

		would seem sensible to make timeliness a key determining factor in the choice between the two at the outset if the desired remedy could be achieved through either.
4.48	PCI investigations will be subject to a nine-month statutory deadline.	The nine-month deadline will necessarily mean that the CMA will have to act at speed, with a marked difference between the PCI process and the existing market investigation process. It would be useful if the CMA sets out explicitly that it may not carry out the same type of analysis and evidence gathering as a market investigation.
Imposing, reviewing, replacing and revoking pro-competition orders		
4.84	"The CMA will have discretion to determine which cases are suitable for commitments, and the circumstances in which an appropriate commitment will be accepted."	It is right that the CMA retains broad discretion over which cases are suitable for commitments, given the myriad range of commitments that may be offered for different AECs. Any constraint in the Guidance could severely hamper the CMA.
4.86	"To be confident that accepting the proposed commitment would be preferable to continuing with a PCI investigation, this means that in practice, the CMA is likely to require a more extensive remedy than might be needed if the CMA were to impose a PCO at the end of a PCI investigation."	It is right that the CMA will require a more extensive remedy than it might impose through a PCO, as this will give reassurance that the remedy will be effective and that the SMS firm is committed to effectively remedying the AEC. Otherwise, SMS firms could be incentivised to devise commitments that would not effectively remedy the AEC. It would be useful for the CMA to make clear in the Guidance that it will generally have a preference for imposing PCOs as opposed to accepting commitments.

4.88	The CMA sets out a range of factors it will have regard to when assessing a commitment.	Given 4.86, it may be appropriate for the CMA to add an additional factor: whether the commitment is less or more effective than a PCO that the CMA may impose absent the commitment.
4.92	"The CMA expects that in most cases, it will not accept a commitment offered at a late stage of an investigation."	This is right, as the acceptance of commitments should not unduly delay the remedying of the AEC. This stance will also encourage a participative, proactive approach from SMS firms (as opposed to waiting to see if the CMA will impose a PCO and attempting to have a more favourable commitment put in place instead).
Monitoring		
Evidence gathering		
6.14	The CMA "has discretion in determining the appropriate course of action or response to submissions received from SMS firms and third parties on the competition requirements[…]". The CMA sets out factors it may take account of.	It may be appropriate for the CMA to add an additional factor it will take account of: whether a CMA investigation could uncover useful evidence required to determine whether action is necessary. This would ensure that third party submissions - which may indicate a significant level of harm but not have a significant level of evidence or significant detail regarding the necessary change required as a result – are not dismissed due to what may be an inevitable lack of detail given a lack of resources, or inability to provide a large volume of evidence due to the key information being held by an SMS firm.
6.18	The CMA sets out that, if "a complainant has specific concerns about disclosure of its identity or its commercially sensitive information, it should let the CMA know at the same time as submitting its complaint. Complainants can also make a complaint anonymously,	The Guidance should be much stronger in setting out the CMA's commitment to anonymity when it is desired by organisations, and there should be a commitment to working with third parties as constructively as possible in

	although this may limit the extent to which the CMA is able to investigate the complaint if the CMA is not able to verify information in the complaint or contact the complainant to request more information".	cases where the third party has concerns about the disclosure of their identity. It should always be possible for the complainant to make their identity known to the CMA, but for their anonymity to be protected. This will give third parties the confidence to engage with the CMA even when they fear retribution from SMS firms.
Monitoring compliance		
6.51	"The CMA will typically require an SMS firm to publish a summary compliance report in relation to those relevant competition requirements to which it is subject."	This should be mandatory, given the crucial summary compliance reports will play in ensuring that third parties that are impacted by the requirements placed on an SMS firm are able to judge whether a firm is complying, and engage appropriately with the SMS firm or CMA. Given the SMS firm has to provide the CMA with a compliance report, providing a summary will be of little burden to the SMS firm, and there seems to be no sound reason why it should not be mandatory (particularly given the substantial benefit to third parties).
6.52; 6.53	In making a case-by-case assessment of what should be contained in summary compliance reports, the CMA will have regard to "the likely value of information in assisting third parties to monitor an SMS firm's compliance with the competition requirement". Reports should "contain sufficient information to allow third parties to assess the extent to which an SMS firm is complying with a competition requirement, including by identifying any failures of compliance and the steps the	It is right that the contents of such reports are made with the value to third parties in mind, and that they should be sufficiently detailed to allow third parties to assess compliance. This will allow third parties to compare SMS firms' own assertions with their own information and data, and discern if there is a gap between the report and the actions of the SMS firm – the ability to identify such gaps will be critical in keeping SMS firms accountable and

	SMS firm has taken or is planning to take to resolve the concerns."	allowing third parties to properly participate in the pro-competition regime.
6.58	"The CMA expects SMS firms to directly engage their users and other stakeholders to seek to resolve compliance concerns in the first instance. However, the CMA may intervene, including where this does not occur or is not effective."	Given the market power imbalance and informational asymmetries between SMS firms and third parties, and lack of resources of many third parties, the CMA should not delay enforcement unduly in the expectation that SMS firms will directly engage in good faith with third parties. It is unclear how an SMS firms' engagement with potentially thousands of businesses and millions of consumers could be tracked effectively and result in timely resolution, so the CMA should be ready to intervene swiftly, particularly when a large number of parties are involved. Engagement may also be inappropriate when third parties fear retribution from SMS firms. The actions of potential SMS firms that have been designated as Gatekeepers in the EU, and their reaction to the threat of designation under the Australian News Media Bargaining Code, have demonstrated that such firms will choose to frustrate and delay enforcement; their opportunity to do so is only heightened if they are allowed to engage at length with third parties without a very real prospect of intervention from the regulator. There is a danger that third parties may be overloaded with information by SMS firms, so the CMA should be ready to step in swiftly if third parties have been given an

		opportunity to engage with SMS firms but are unable to engage effectively.
6.59	"Where it is possible and appropriate to do so, the CMA will seek to achieve a participative resolution of compliance concerns" (rather than enforcement action). The CMA sets out a range of factors it will take into account when considering whether a participative (as opposed to enforcement) approach is appropriate. One of these factors is "the extent to which resolution without enforcement action is likely to achieve timely, durable and effective changes in conduct by the firm and/or positive outcomes for affected market participants".	It is right that the CMA considers whether a participative approach will achieve durable and effective change, as the key risk of a participative approach is that does not achieve as effective a change as enforcement. The CMA could add an additional factor that it will consider when deciding if a participative approach is appropriate: whether there is a particular danger that an SMS firm will retaliate against third party complainants, as an enforcement approach will generally be appropriate in these cases. In order that the participative approach does indeed lead to durable and effective change, it may be useful for the CMA to consider updating CRs/Interoperative notes when the participative approach has led to a successful resolution.
6.60	The CMA sets out a range of actions it may take when resolving compliance concerns through a participative approach. These are: engagement; letters of concern; voluntary undertakings.	A lack of transparency on ongoing participative efforts or the outcome of these efforts could lead to a lack of clarity regarding what SMS conduct is deemed acceptable. The Guidance should state that relevant third parties will be kept abreast of these steps as much as possible. It may be appropriate to take a stepped approach to transparency, corresponding to the nature of the participative approach that the CMA takes.

		For example, letter of concern or a summary of a letter of concern should be shown to the most relevant third parties as a matter of course, whilst voluntary undertakings should be published publicly. More generally, the CMA should make a public statement when it has made a decision to take a participative approach to enforcement on a key issue, and when there is a key development, allowing interested third parties to engage with the CMA and the SMS firm. This will ensure that third parties are able to engage in the participative approach, for example by flagging to the CMA when the voluntary undertakings being discussed by the SMS firm will not alleviate the competition concerns under consideration. In terms of facilitating multilateral dialogue with an SMS firm or relevant third party (the engagement approach), it may be useful for the CMA to provide an indication of what framework it may use to support negotiations.
Monitoring effectiveness		
6.74	"The CMA also recognises that there are likely to be various factors driving market dynamics and behaviours, meaning it may not be possible to directly relate competition requirements to specific changes in underlying competitive conditions. The CMA will therefore assess the evidence on effectiveness in the round."	The CMA is right to acknowledge that it is difficult to be precise about cause and effect regarding competition requirements and changes in competitive conditions. A general improvement in competitive conditions where there are reasonable grounds to suppose that a CR has played a role in that improvement should be sufficient to keep that CR in place.

Monitoring whether to impose, vary or revoke competition requirements		
6.83	"In the case of CRs that the CMA is concerned may no longer be appropriate, the CMA is likely to consider whether it would be appropriate to vary the CR before deciding if it should be revoked."	This is right, as otherwise the CMA could revoke CRs with the danger of creating significant unintended consequences on third parties.
6.84	"If the CMA revokes the SMS designation following a further SMS investigation, the competition requirements will expire, unless the CMA makes transitional, transitory or saving provisions in relation to those competition requirements to manage the impact on the competition requirement's beneficiaries."	Similar to 6.83, the CMA should consider – as a matter of course – whether to make transitional, transitory or saving provisions. This will be critical in preventing unintended consequences on third parties occurring.
Enforcement of competition requirements		
Investigations into suspected breaches of competition requirements		
7.11	During an initial assessment of a potential breach, the CMA states it will "engage with complainants and/or other relevant third parties to the extent it considers it appropriate to do so".	The CMA's commitment to engagement with complainants and/or relevant third parties should not be caveated; it will always be appropriate to engage with these stakeholders when making an initial assessment of a potential breach.
7.20	When it has reached an initial assessment regarding a breach, the CMA states it "may also seek representations on provisional findings directly from relevant third parties".	The CMA's commitment to engagement with relevant third parties should not be caveated; it will always be appropriate to seek representations from relevant third parties when seeking views on its provisional findings.
7.22	As part of making provisional findings, the CMA will consider whether a financial penalty should be imposed on the firm for a breach of competition requirements.	It is right that, as a matter of course, the CMA considers if a financial penalty is required for the breach of competition requirement. The participatory nature of the regime should not discourage the CMA from issuing financial penalties, as ultimately this is the key incentive for SMS firms to comply.
7.23	"The CMA will typically publish an update on its website when it issues a firm with its provisional findings in relation	The CMA should publish an update when it issues a firm with provisional findings in all cases, as this will be

	to an investigation into a suspected breach of a competition requirement."	invaluable in allowing third parties to engage with the enforcement process.
7.27	"The CMA also recognises that in some cases complainants and other third parties may be directly affected by the outcome of an investigation. The CMA will involve third parties in an investigation to the extent the CMA considers it appropriate in order to carry out its functions fairly, transparently, and effectively."	It is hard to envisage any investigation that the CMA will carry out that will not have a direct impact on complainants and third parties. Therefore, it would be useful for the CMA to make a much stronger commitment to involving complaints and third parties in investigations, including the disclosure of information that would be useful in allowing third parties to engage usefully with the CMA. An over emphasis on SMS firm engagement, with a corresponding under emphasis on complainant and third-party engagement will naturally make it difficult for the stated objectives of fairness, transparency and effectiveness will be very difficult to achieve.
7.34	The CMA states that it will "typically issue its penalty decision at the same time as giving notice of findings in relation to breach of the requirement".	In the interests of rapidly resolving a breach of a competition requirement, thereby ensuring the timeliest remedy for consumers and businesses impacted by the breach, it would be better for the CMA to prioritise the notice of findings over the issuing a penalty notice. This would have the added benefit of clearly delineating the decision that a breach has been made and the decision to impose a penalty.
Enforcement of competition requirements		
7.44	In deciding whether to make an IEO, the CMA will consider the statutory criteria, which includes an ability to set an IEO "to prevent conduct which could reduce the effectiveness	The CMA sets out that public interest may include acting to "to prevent damage being caused to a particular industry, to consumers, or to competition more generally as a result of the relevant behaviour."

	of any other steps the CMA might take" or "to protect the public interest".	It would be useful if the CMA set out that the public interest is a broad concept which does not only encompass consumer benefits, but also wider social and cultural benefits. It would be entirely appropriate for the CMA to use an IEO to prevent serious social or cultural harm in the short term, whilst a breach investigation was ongoing.
7.61	In assessing whether the CBE applies, the CMA will consider benefits and detriment in the shorter and long term.	It is right that the CMA places an emphasis on considering the longer as well as shorter term impacts. This will ensure that SMS firms are not able to avoid compliance with CRs which may take time to bed in, as CRs that are ultimately the most impactful may well do.
7.62	"[…] where a firm seeks later to rely on the CBE in a conduct investigation, and benefits of conduct have already been taken into account by the CMA [when the CR was imposed], the CMA will expect the firm to provide new evidence going beyond any previous submissions or representations it has made on the relevant matters."	This is right, as the CBE is intended to capture benefits that were not apparent at the time that a CR was set, accounting for developments in fast moving digital markets. The Guidance could also clarify that the CMA will be less likely to consider new evidence from SMS firms if it is evidence that it could have reasonably provided at the time of a CR investigation but chose to withhold.
7.68	One of the necessary conditions for the CBE to apply is that the benefits could not be realised without the conduct. The CMA states that this "condition imposes a standard that is akin to the 'indispensability' test in section 9(1)(b) of the CA98. Therefore, the CMA will have regard to the interpretation of that test when applying condition 3."	The CMA is right to specifically reference 9(1)(b) given that during the passage of the DMCCA, at the first Lords Consideration of Commons Amendments Minister Camrose stated that Condition 3 and the indispensability principle are "equally high" and therefore the threshold is "equivalent", albeit used in different contexts.

		Minister Camrose further stated that the change from the word "indispensable" to the new form of words during the passage of the Bill does "not change the effect of the Clause" as it "still requires the same high threshold to be met, and has the same safeguards".
7.74; 7.76	When deciding whether to accept a commitment from an SMS firm subject to a conduct investigation, the "CMA will have discretion to determine which cases are suitable for commitments and the circumstances in which an appropriate commitment will be accepted." "[…] the CMA's acceptance of a commitment once a conduct investigation has been launched will likely be rare in practice" due to likely attempting a participatory approach first and the short statutory deadlines of the investigation.	It is right that the CMA retains discretion. It is right that the CMA will not generally accept commitments once a conduct investigation has been launched, as SMS firms should offer commitments in a proactive and timely manner; otherwise, the offering of a commitment could distract from the conduct investigation and take up resources.
7.79	As the CMA is prevented from issuing a notice of findings once it accepts a commitment, "the CMA may require a more extensive commitment than might be needed if the CMA were to impose an EO at the end of a conduct investigation".	It is right that the CMA requires a more extensive remedy than it might impose through an EO, as this will give reassurance that the remedy will be effective and that the SMS firm is committed to effectively remedying the CR breach. Otherwise, SMS firms could be incentivised to devise commitments that would not effectively remedy the breach.
7.100; 7.101	The CMA may consent to a firm acting in a way that would otherwise constitute a breach of an EO – DMCCA 31(8). The CMA states that an example of when it may do is when "a firm provides compelling evidence that it should be able to continue particular aspects of its behaviour which could	It is right that the CMA sets a very high threshold for a firm to be allowed to proceed with conduct. The Guidance could allude to elements of the CBE test as indicative of the level of certainty it will require in order for a firm to act in a way that would otherwise constitute a breach of an EO (even if in practice it does not apply the CBE tests in precisely the same way).

	breach the EO, but which would not result in harm; or where there has been a material change of circumstances." "The CMA may publish granted consents in appropriate cases, such as where it wishes to provide clarity to impacted third parties as to why a firm is acting in a way that would otherwise be contrary to its EO obligations."	Given the wasted resources that a third party could expend if it is unaware that an SMS firm has been given such a consent – e.g. gathering and providing evidence for the CMA, or trying to resolve the issue with the SMS firm – the CMA should publish consents in all cases.
7.114	"The FOM may only be initiated after a conduct investigation finding a breach of a CR and the subsequent breach of an EO (see below for more details as to the conditions for initiating FOM). The timeline for progressing through each of these steps may vary."	For the FOM to be a credible incentive to negotiate, there must be a realistic prospect of it being reached. The CMA could clarify – either in this part of the Guidance or at the relevant parts relating to finding a CR breach and the breach of an EO – that, given 20(2)(a) is unique in having the FOM as a backstop, the CMA will sometimes expedite its standard enforcement processes for 20(2)(a), for example if an SMS firm is simply refusing to engage with a third party. This approach was anticipated by Government Ministers in the Lords during the Act's passage. At Lords Report Stage, Minister Camrose stated that: "[…] if SMS firms try to frustrate the process or drag it out to the detriment of third parties, I agree that the DMU should be able to accelerate stages before the final offer mechanism is invoked. That is why we have ensured that the DMU will be able to set urgent deadlines for compliance with enforcement orders, supported by significant penalties where appropriate, in cases of non-compliance." Clearly, an acknowledgement in the Guidance that the CMA will sometimes expedite enforcement processes

		that relate to 20(2)(a) would be entirely in line with the Government's intention.
7.120	When setting out the fact that the FOM can only be initiated when, by failing to agree fair and reasonable payment terms for the transaction(s), the SMS firm has breached an EO made in relation to a breach of a CR, the CMA states: "The FOM is therefore intended to be used at a late stage of the enforcement process…".	This phrasing is unhelpful, as the term "late stage" could be taken to mean that there is a certain amount of time that should elapse before the stages prior to the FOM are moved through. Whilst, of course, SMS firms and third parties should be given the time to come to an agreement outside the FOM process, in some cases it may be appropriate to move through the enforcement states quickly. This sentence should be removed.
7.122	The FOM can only be initiated if the CMA could not satisfactorily address the breach within a "reasonable timeframe" by exercising any of its other digital markets functions. The CMA then sets out what functions make be most appropriate including CRs; PCIs; varying an EO; or enforcing an EO by imposing financial penalties or through court enforcement.	Given that the FOM process can take up to six months, the Guidance could clarify that this gives the CMA a good guide as to what constitutes a "reasonable timeframe". The CMA should clarify that it will generally initiate the FOM if it believes that other functions would take substantially longer than six months to resolve the issue. This is important given that it can take several months for a CR or PCI to be imposed and have an impact. It should also be clarified that if a new CR is put in place to address a breach of 20(2)(a), this does not 'restart' the roadmap to the FOM, and the CMA can still initiate the FOM in response to the original breach at any time if the additional CR is ineffective.
7.124	Aside from the three statutory conditions that must be met for the FOM to be initiated, the CMA will also consider two additional factors in determining whether use of the FOM is	It seems odd to focus on the complexity of a transaction when they key factor that will lead to the FOM being initiated – given that an SMS firm will have had to breach

	appropriate. These are (a) whether payment terms are the key terms under dispute; (b) whether the nature of the transaction(s) is complex. The CMA will also consider whether initiating the FOM aligns with its Prioritisation Principles.	a CR and an EO – will be an imbalance in market power. This market power imbalance can manifest just as easily in a simple transaction as a complex one. In short, the relative lack of complexity of a transaction should not be a barrier to the FOM being initiated. To note, the complexity of a transaction is already considered in 7.123 in relation to the consideration of using other digital markets functions in 7.122. It is also questionable as to whether this should be explicitly mentioned.
7.134	When the CMA is considering whether to allow collective submissions under the FOM, it will consider in particular: "(a) any key differences in the third parties' circumstances or bargaining power which is likely to lead to a difference of views between them on what are considered 'fair and reasonable' payment terms; and (b) any differences in the goods or services being provided, acquired, or used which would necessitate a difference in payment terms".	The CMA should also have regard – and this should be the principal consideration – as to whether the third parties wish to be 'joined third parties'/'grouped third parties'. A desire to be grouped should be a firm indication that there is not a significant difference in views on what constitutes fair and reasonable terms and that the firms are content for the differences between the goods or services that they are offering to be accounted for in the FOM process and/or that there is not a significant divergence in the goods and services offered. Moreover, it would seem wholly inappropriate for the CMA to prevent third parties from negotiating collectively if they wish to do so, except when the CMA considered that it simply could not conduct the FOM process under those circumstances.
7.136	When it issues its Final Offer Intention Notice, the CMA will also "issue transaction-specific guidance on the	This is welcome and will be helpful in reducing the ability of SMS firms to frustrate the FOM process, whilst also

	appropriate substance of and format in which bids should be submitted, in addition to any necessary accompanying evidence".	helping to ensure that third parties are able to submit bids of comparable quality to SMS firms. To ensure that third parties with limited resources are not disadvantaged in the FOM process, the CMA should ensure that its transaction-specific guidance does not put an undue burden on third parties in terms of the level of detail and volume of evidence required of them.
Penalties for failure to comply with competition requirements		
The role of penalties and the CMA's approach		
8.9; 8.11	"The CMA will therefore not hesitate to impose substantial penalties – both to deter individual businesses that breach specific requirements from further breaches, and to ensure that all those subject to the regime understand the consequences of non-compliance."	The CMA is right to indicate that it will not hesitate to impose penalties. Whilst it is right that a breach does not automatically lead to a penalty, it is also right there is not a set threshold e.g. a breach being committed intentionally and/or negligently for a penalty to be imposed (whilst it is appropriate for these factors to be taken into account). This discretion will be helpful in ensuring that the CMA can use the penalties as appropriate to spur the timely compliance which is necessary for consumers and business customers to benefit from the regime. Whilst it is of course preferable for breaches to be resolved swiftly via a participative approach, fines should not be viewed as exceptional, and the CMA should never indicate to an SMS firm that it's investigation of a breach is being conducted with fines out of scope.
8.13	"Where the CMA has a choice as to the type(s) of penalty that may be imposed (ie a fixed penalty, daily penalty, or a	It is right that the Guidance notes that daily penalties may create greater incentives to comply. Fixed penalties

	combination of the two), it will have regard, among other factors, to the need to incentivise timely compliance. A daily penalty (whether alone or in combination with a fixed amount) may create greater incentives for undertakings to comply swiftly since the penalty level will be directly related to the time the undertaking takes to comply. This may be particularly important, for example, where the failure to comply is resulting or risks resulting in, ongoing harm or loss to third parties or consumers."	can often be written off by a Big Tech firm as a business expense, but if a daily penalty is of sufficient size, it will be more likely to ultimately ensure compliance. The Guidance should make clear that, where the failure to comply is resulting or risks resulting in, ongoing harm or loss to third parties or consumers, it will not only be likely to issue daily penalties, but also that these daily penalties will be of a size sufficient to incentivise swift compliance.
8.15; 8.16; 8.17	The CMA may only impose a penalty where it considers that a failure to comply with a requirement is 'without reasonable excuse'. "[...] the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or a significant factor or event beyond the undertaking's control has caused the failure, without which the failure would not otherwise have occurred. The CMA expects undertakings to draw such events or factors, or the potential for them to occur, to its attention at the earliest opportunity and not to raise them for the first time in response to an investigation into a suspected breach of competition requirements."	This is right, as there should be a high bar to avoid penalties, and an SMS firm must be able to demonstrate that it could not have anticipated an event that caused the failure, and could not have prevented it. It is right that SMS firms are expected to raise such issues proactively, as this will encourage swift resolution of the breach, as well as ensuring that SMS firms do not confect extenuating circumstances to evade penalties when they become a serious prospect.

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News Media Association

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