

**CMA consultation on its guidance document under the Digital Markets,  
Competition and Consumers Act  
Response from Proton  
July 2024**

This document is the response of Proton to the CMA's consultation on the draft guidance document on the CMA's proposed approach to exercising its new powers under the Digital Markets, Competition and Consumers (DMCC) Act.

Proton is a leading privacy communications provider and high-growth company offering a suite of end-to-end encrypted services to individuals and organisations worldwide. Our principal product, Proton Mail, is the world's largest end-to-end encrypted email service. Our second product, Proton VPN, is one of the world's most popular virtual private networks. These products--along with Drive, Calendar, and Pass--service over 100 million user accounts. Our vision of building a better internet that is private by default differs from the predominant business model of exploiting user data for advertising.

Competition is essential for privacy and freedom to thrive online. Users need to have the choice to easily switch to a competitor when they are dissatisfied with a dominant platform. Proton welcomes the CMA's enforcement of the DMCC and is grateful for the opportunity to participate in the consultation.

### ***Chapter 2: Strategic market status***

The explicit acknowledgement in 2.7 that the scope of "digital activity" includes services provided for free to users is important, as the surveillance advertising business model is predominant among dominant tech firms. We would welcome the CMA's study of how free services can be either competitive or anticompetitive, depending on how the services are tied or bundled with other products and how user data is exploited in the process.

The CMA's June 2022 mobile ecosystems market study report is an important source of evidence, and we agree with the statement in 2.65 that such market studies can be used in SMS assessments. The market dynamics studied in that report have not changed substantially since that research was conducted, and repeating the investigation for the purpose of a new SMS assessment would be largely duplicative.

We agree with the assessment that the determination of whether the number of U.K. users is considered significant is context-specific and will differ depending on the market under investigation. Both the absolute position and the overall number of users is important, as a SMS firm may have a dominant position in a market that has a smaller number of users overall and it is important to analyse both figures.

### ***Chapter 3: Conduct requirements***

We recommend the requirement in 3.7(b)(ii) to prevent an SMS firm from using its position in relation to a digital activity to treat its own products more favourably also include a reference to the limitations placed on competitors. For example, iOS limits the ability of developers to offer certain features on products that compete with Apple native apps. This is a strategic use of market power in the operating system market to degrade innovation in other markets.

It would be helpful for the guidance to specify in 3.12 that the CMA will favour imposing a CR (or a combination of CRs) when such an intervention would be sufficient to address the issue rather than pursuing a PCI investigation. Digital markets are in dire need of correction, and since CRs are a faster approach they should be favoured when appropriate.

The discussion of CRs applying to non-designated activities in 3.13-3.15 is important for the types of anti-competitive conduct the DMCC seeks to address. The CMA is correct to recognise that an SMS firm may engage in anti-competitive behaviour by carrying out activities that materially strengthen its market power but are outside the scope of the defined digital activity. The leveraging of control of an operating system to strengthen positions in other markets, such as email and identity management and software distribution is one example where considering non-designated activities will be relevant. The CMA should anticipate that SMS firms will attempt to manipulate the categorization of digital activity to evade DMCC compliance. It could be helpful for this section to include a discussion of how the CMA expects to address such manipulation, as an SMS shifting the anti-competitive conduct from one digital activity to another will undermine the goals of the DMCC.

#### ***Chapter 4: Pro-competition interventions***

There is some ambiguity in the guidance as to whether the PCI remedies listed in 4.24 could also be CRs, and it would be helpful to specify that some remedies could be achieved through both the CR and the PCI processes.

#### ***Chapter 6: Monitoring***

The requirement in 6.51 for SMS firms to publish summary compliance reports is essential to ensuring transparency in the process. Proton and other companies affected by the behaviour of SMS firms will wish to review their plans submitted to the CMA, because we have found that firms required to comply with the Digital Markets Act in the EU and federal court orders in the US have presented non-compliant plans.

#### ***Chapter 7: Enforcement of competition requirements***

We anticipate that the countervailing benefits exemption will be abused by SMS firms to thwart the CMA's enforcement efforts. As a privacy and security company, Proton is especially invested when dominant firms use privacy and security justifications as a pretext for anti-competitive behaviour. Therefore, we were encouraged to see the third condition outlined in 7.68-7.70 that means that there is "no other reasonable or practical way for the firm to achieve the benefits with less anti-competitive effect." This indispensability test should be rigorous enough to only allow SMS firms to use the exemption for legitimate privacy and security benefits, while rejecting spurious claims.