

**Santander UK response to the CMA's consultation on the Digital Markets Competition
Regime Guidance**

1. Introduction

- 1.1. Santander UK welcomes the introduction of the UK's new digital markets regulatory regime following the passage of the Digital Markets, Competition and Consumers Act (the "Act"). We believe that this is an important and necessary step to preserve competition and good consumer outcomes in the UK in light of the extensive market power that firms likely to have Strategic Market Status ("SMS") yield through their digital markets activities. Once the new regime is up and running, we believe that it will bring extensive benefits to UK consumers in the years to come.
- 1.2. We also welcome the opportunity to respond to the CMA's consultation on its draft guidance for the new digital regime (the "Draft Guidance"). While we recognise the guidance is comprehensive and we support the CMA's overall approach, there are a number of areas where we think additional consideration is needed. We have also flagged the areas where the CMA's discretion in applying the Draft Guidance (in the absence of case law precedent) will be important in maximising the effectiveness of its enforcement powers and thus strengthening the deterrent effect that the new regime will have on SMS firms. Finally, as a regulated firm in financial services (where SMS firms play a role in customer journeys or in the provision of critical infrastructure), we are keen to ensure that regulatory coordination between the CMA and FCA/PSR is considered at the outset of the new regime, both to provide business certainty and to ensure that there is no enforcement gap at the intersection of digital and financial services.
- 1.3. This response covers the following topics:
- i) Key timing issues (**Section 2**);
 - ii) The risks that the countervailing benefits exemption ("CBE") could pose to enforcement effectiveness (**Section 3**);
 - iii) The need for clarity on when Conduct Rules ("CRs") versus Pro-Competition Interventions ("PCIs") will be used (**Section 4**); and
 - iv) The necessity for regulatory coordination and coherence where sectoral regimes exist, given the ubiquity of digital journeys and infrastructure (**Section 5**).
- 1.4. We would be happy to discuss our response in more detail with the CMA and other relevant stakeholders if that would be helpful. Please direct any correspondence in the first instance to [redacted]. Please note that this response contains commercially sensitive information, disclosure of which could harm Santander UK's legitimate business interests. A separate non-confidential version has been provided.

2. Key timing issues

Parallel investigations

- 2.1. We welcome the fact that the Act has placed a duty of expedition on the CMA when carrying out its new digital market functions. In light of the speed of growth and the known business practices of SMS firms within scope of the new regime, we believe that prolonging the

enforcement and regulatory gap in digital markets could further entrench competitive harm (and thus worsen consumer outcomes) and impact the UK's international competitiveness as an investment destination.

- 2.2. The legislative timeline for an SMS firm's activities to receive SMS designation, and then for CRs to be imposed, is nonetheless significant. Each step requires a separate c. nine-month investigation. We therefore welcome the CMA's willingness to design and consult on CR packages in parallel with the SMS designation process. This is an important expedition measure as it effectively cuts the time required for new obligations to take effect in half. We urge the CMA to do this as standard practice.
- 2.3. Chapter 3 paragraph 3.35 states that the CMA will aim to impose initial CRs "as soon as practicable" following an SMS designation decision. We urge the CMA to be more ambitious with its duty of expedition by aiming for this to happen on the same day where possible.
- 2.4. For the avoidance of doubt, we do not think that running a CR investigation in parallel with designation is, in any sense, pre-judging the outcome of the CMA's SMS designation investigation (particularly where precedent European Commission designations or enforcement decisions exist). Should, following investigation, the CMA decide not to designate a firm, the draft CRs can simply fall away. It is unlikely that this would result in significant wasted work for the CMA (and will create significant synergies overall) as the two investigations will heavily overlap in terms of the subject matter and evidence considered, given the linkage between harm and remedy. The benefits of acting swiftly in fast evolving markets where competition harm is scaled mean speed is of the essence.

Prioritisation

- 2.5. Even on the basis of parallel investigations, issues prioritised for Day 1 Digital Markets Unit activity will not result in restrictions or obligations on SMS firms taking effect until H2 2025 at the earliest, with the exact timing depending on passing of secondary commencement legislation. This is despite these issues already causing – or having the potential to cause - tangible competitive harm. For issues that are not prioritised for Day 1 activity, competitive harm will endure still further. In this regard, and recognising that the CMA will face demands from a wide variety of complainants across multiple sectors to apply the new regulatory regime to address specific issues, we urge the CMA to, as far as possible, ensure that Day 1 activity is as comprehensive as possible in addressing all currently known issues.

Investigation timelines

- 2.6. There is a nine-month statutory deadline for an initial SMS investigation, however in many cases it should be possible to reach a decision more quickly. By comparison, the vast majority of the CMA's merger reviews are dealt with in phase 1 within 4-5 months (including pre-notification). Only phase 2 cases, which involve collection and analysis of vast quantities of documents and data and lengthy remedy discussions, require nine months to conclude.
- 2.7. Often there will be extensive information available to the CMA in the public domain, provided by complainants, or already collected by other regulators in the UK or abroad. For straightforward SMS designation cases where there is ample information available, we urge

the CMA to set an ambitious target date that is well in advance of the statutory deadline. This could be achieved by applying a fast-track settlement procedure where a firm accepts the SMS designation in order to focus efforts on the more substantive discussions regarding CR or PCI packages.

Leveraging EU progress

- 2.8. We urge the CMA to consider what lessons can be learned from the EU's work to date with its own digital markets regime under the Digital Markets Act ("DMA"), and also antitrust enforcement. Since it came into effect on 2 May 2023, the EU has designated seven Gatekeepers engaged in 24 Core Platform Services. It has also started wide-ranging enforcement actions against SMS firms for non-compliance with the DMA. While the UK's new regime has some divergences from the EU's approach, it is likely that the eventual designations will end up being similar. The CMA should, as far as possible co-operate with the Commission to share evidence and learnings in order to expedite the CMA's roll out of the new regime.

3. Ensuring the CBE is not used as an avoidance mechanism

- 3.1. The Act provides SMS firms with the opportunity to apply for a CBE if they breach a CR. If this exemption applies, the CMA must close its conduct investigation into the CR breach.
- 3.2. It is important to note that the UK's approach here contrasts with that taken by the EU and there is a risk that this could undermine enforcement of the new digital markets regime.
- 3.3. It is inevitable that, as part of well-developed corporate narratives, SMS firms will have many readily available (and evidence-based) arguments for why the restrictions they place in relation to their SMS services can provide user benefits, which at first glance look compelling. The very nature of SMS services means that they are often innovative and considered to be indispensable by end users. In addition, the services are often offered for free but monetised in other ways (for instance, through adverts, sale of data or cross-selling other services). SMS firms also have significant resources to instruct experts (including economists and consultants) who will be able to craft CBE arguments for any issue.
- 3.4. However, as the CMA is aware, economic analysis is complex and often the subject of protracted, multi-year debates between experts in investigations or litigation. In the context of a CR breach, the CMA might face challenges in forensically investigating and rebutting SMS firms' submissions on CBEs, particularly when applying Prioritisation Principles and finite resources to a number of significant issues within slim timelines. There is a risk that this tactical advantage for SMS firms – and threat of appeal by firms with significant resources – means that the application of CBEs within procedural or political timelines could provide a route for SMS firms to evade CRs.
- 3.5. Indeed, it is not implausible that SMS firms may choose to breach CRs as a commercial decision or strategy.¹ In addition, even if the CMA does make a decision against a CBE, the

¹ For example: Apple has recently announced a new set of business terms for app developers in the EEA in advance of the DMA and the Commitments taking effect in March 2024. The new terms introduce a "Core

past behaviour of SMS firms when facing competition enforcement suggests that they will likely run the full course of appeals in seeking to overturn the decision. Those legal battles could last for several years.

The need to set a high standard

- 3.6. It is important that the early enforcement actions in respect of CR breaches establish a high standard for the CBE to be met because this will, through appeals, set the precedent that will apply for the new regime in the long term. The Act sets several conditions for CBEs which are similar to those set for the efficiency defence under Chapter 1 of the Competition Act 1998 (the “Efficiency Defence”). The Efficiency Defence has been developed extensively through case law and, as a result, firms have some clarity about how it will be applied in practice. For instance, the CMA’s Vertical Agreements Block Exemption Order Guidance sets out how it will be applied to several specific types of vertical restriction.
- 3.7. However, the CBE has been introduced by the Act as a new legal concept. The CMA is therefore not bound by case law and has greater discretion in how to apply it at the start of the new digital regime.
- 3.8. Given the discretion that the CMA has in applying the statutory tests at this early stage, we urge them to set a high standard, and also to make clear in the Draft Guidance that CBEs will only apply in extraordinary circumstances.

4. Clarity regarding when the CMA would choose CRs versus a PCI

- 4.1. Whilst the Draft Guidance is clear on the individual requirements and procedures for implementing CRs and PCIs, it is unclear what the factors or triggers would be for the CMA to select one tool over the other (both appear to apply to individual firm conduct). Since there are significant differences between the two in terms of implementation timings (the nine-month PCI investigation can only be started after a notification has been provided to a designated firm, which means that it can only begin after the SMS investigation has concluded, whereas CRs can be designed and consulted on in parallel to the SMS investigation), it would be helpful to understand what the objectives and aims for each of the tools are, and the factors that would be included in the CMA’s decision on which to use.
- 4.2. The Draft Guidance could add more detail (for example at Chapter 3, para 3.12) about the CMA’s process for deciding whether to intervene through CRs or PCIs. This information is particularly important where such tools will be relied upon by sectoral regulators to address competitive or conduct harms having effects in the downstream or adjacent regulated markets.

Technology Fee” charging app developers with over 1 million user installations a per-annual-install fee of EUR 0.5. This fee is not charged to app developers who choose to remain on Apple’s previous business terms (i.e. pre-DMA, with Apple retaining app store exclusivity). This has been heavily criticised by Spotify, who believe that the move represents Apple’s attempt to “force developers to stay with the status quo” and “completely negates the goal of the DMA”. The CEO of Epic Games, Tim Sweeney, has [described](#) the move as “malicious compliance”.

- 4.3. Where the competition harm in question: i) is already well established; ii) relates to a specific SMS firm; and iii) can be solved by a CR within the permitted types under the Act, we believe that CRs will be the most appropriate mechanism to use. [§<].

5. Regulatory coordination - concurrency

- 5.1. The new digital regulatory regime introduced by the Act raises new issues of concurrency as between the CMA and sector regulators. In light of the impact that digital activities and SMS firms are likely to have on customer journeys and the provision of critical infrastructure across a number of regulated sectors, we believe that the existing concurrency arrangements (which are exclusively focused on the allocation of traditional antitrust cases) need to be updated as a priority to reflect the CMA's new roles in both digital markets and consumer protection. This is in line with the Government's drive for a simpler regulatory framework through the Smarter Regulation initiative.
- 5.2. We illustrate the potential issues that a lack of regulatory coordination could create using hypothetical examples from our own sector, financial services, which is regulated by the FCA and PSR.
- 5.3. The FCA has undertaken work in recent months to understand the potential competition harms that could arise from the entry of Big Tech firms into financial services. Big Tech firms are increasingly entering financial services, either directly or in partnership with traditional providers. Moreover, in light of increasing customer reliance on platforms and mobile phones, Big Tech firms increasingly act as a critical part of a customer's journey to customer services (a gatekeeper role). This will be a critical feature of financial services going forward.
- 5.4. In its recent feedback statements on this work (FS23/4 and FS24/1), the FCA has set out several workstreams to monitor developments and ensure that competition harms from Big Tech firms' dominant positions do not arise in financial services. It is clear that a number of the potential issues that it has identified could be addressed by the CMA using its new digital powers – whether through CRs or PCIs. It moreover appears that the CMA has been given primary responsibility for such remedial or preventative action.
- 5.5. This raises a number of foreseeable issues:
- i) It is not clear how the FCA's own-initiative diagnostic work in its sector (analysing issues caused by SMS firms that impact customer outcomes or competition in financial services) will be impacted by reliance on the CMA taking action to address the harm. The CMA has Prioritisation Principles to consider in choosing cases and workstream, and its own obligations to consult or investigate prior to making an intervention under the digital regime. Specifically, therefore, there is a risk that the FCA (or PSR)'s objectives in digital markets – or any required remedial work identified - might not be pursued because of the CMA's prioritisation choices or resourcing constraints. This could leave an enforcement or remedial lacuna for serious competitive or conduct harms in financial services.
 - ii) Alternatively, in the absence of CMA action, the FCA could instead seek to address harm caused by SMS firms using other powers available to them. Sector regulators could also

indirectly impact digital issues when exercising their regulatory duties on other matters. As a result, there may end up being overlapping regulatory initiatives in digital markets.

- iii) Third, the FCA's perimeter of regulated activities evolves over time. Should Big Tech firms designated as having SMS enter into traditional financial services (e.g. current accounts, payments), or should the FCA's perimeter expand to cover new digital activities undertaken by SMS firms (e.g. digital wallets, financial product platforms or digital currencies), both the FCA and the CMA could have responsibility for supervising conduct or identifying/addressing harm, and a diverse set of tools. Overlapping regulatory regimes are not optimal for business certainty, and also give rise to risk of duplication of efforts by publicly-funded agencies (with additional burdens also placed on firms responding).

Alternatively, overlapping supervision or regulatory initiatives could lead to stymied activity in the belief that someone else is already responsible for it or better placed to do the work, or because of confusion about appropriate allocation.

5.6. [REDACTED].

5.7. [REDACTED].

Suggested regulatory co-operation enhancements

5.8. We recognise that the Act and the Draft Guidance do take some steps to acknowledge and address the need for regulatory coherence, including that:

- The CMA has a duty to consult with the FCA, Ofcom, ICO, Bank of England and PRA under certain circumstances and there is a statutory mechanism for the FCA and Ofcom to make recommendations to the CMA;
- Information from those regulators can be used as the basis to open an SMS or PCI investigation and the CMA will consider whether upcoming regulatory developments will impact on the market power of a firm when making an SMS designation decision (or reassessment);
- The CMA can take into account the coherence of a proposed CR package with the wider regulatory landscape;
- When deciding whether there is an adverse effect on competition during a PCI investigation, the CMA can take into account the powers of other regulators; and
- PCIs can take the form of a recommendation for another regulator to take action.
- Currently, the Draft Guidance only states that, beyond its statutory requirements, the CMA is "*open to input from the wider regulatory community*".

5.9. While those steps are welcome, in our view further and more concrete steps are needed.

5.10. Now the Act has passed – and recognising the step change in the CMA's role in digital markets and consumer protection - we would welcome early review by regulators of the Concurrency Arrangements - antitrust enforcement is now only one element of the overlap between the CMA and other regulators. Particular consideration needs to be given to memorialising cooperation on issues at the intersection of digital and financial services. For sectors that

are both so critical to the UK economy and impact the day to day lives of all UK customers, informal or ad hoc reliance on regulators “working closely together” cannot suffice.

- 5.11. The CMA and Government must ensure that sector regulators have the necessary powers to take action on digital issues that impact them where they are the most appropriate party to do so, or to have some degree of certainty that the CMA where only the CMA can act. This could happen, for instance, through extension of the CMA’s new digital powers so that they also apply to sector regulators.
- 5.12. In terms of the Draft Guidance, we urge the CMA to go beyond the minimum level of co-operation required by the Act. Notwithstanding the need for the substantive consideration described above, we urge the CMA to go further in the Draft Guidance by committing to co-ordinate activity with the wider regulatory community through a multi-year roadmap and to rationalise overlapping initiatives.
- 5.13. For example, in addition to participation in the Regulatory Initiatives Grid (<https://www.fca.org.uk/publications/corporate-documents/regulatory-initiatives-grid>), the CMA could work with relevant regulators to formulate a plan for the UK’s digital markets regime over the next five years (appreciating that these are fast moving markets and the plan is likely to require periodic revision). That plan could be published and could provide clarity in terms of which regulators will be progressing which projects using which powers. Any overlapping initiatives should be rationalised using an appropriate and transparent allocation mechanism taking into account the relevant expertise of the regulators in question. The CMA should also regularly share information with other UK regulators through forums such as the Digital Regulatory Co-operation Forum and should apply the expertise of those regulators in its digital markets work.
- 5.14. We have not addressed in this response the fact that the Act brings to the fore other concurrency issues in relation to market investigations and consumer protection. In light of the new financial penalties for non-compliance with market investigation orders introduced by the Act, as well as our experience of working with the CMA on these issues arising from the Retail Banking Market Investigation Order over the last eight years, we would welcome the opportunity to provide the CMA with our thoughts on these issues.

7. Conclusion

- 7.1 We hope that you find this response helpful and would be happy to discuss if that would be helpful. For ease of reference, our key comments and requests are as follows:
- i) We welcome the CMA’s willingness to design and consult on CR packages in parallel with the SMS designation process and urge them to do this as standard practice;
 - ii) Where relevant, we urge the CMA to set ambitious targets to impose CRs on the day of SMS designation;
 - iii) In many cases, the CMA should be able to set ambitious targets for completing a designation investigation well in advance of the nine-month statutory timeline;

- iv) As far as possible, the CMA should ensure that its Day 1 designation activity is as comprehensive as possible to address all currently known issues, leveraging experience in designating firms under the Digital Markets Act and antitrust cases in Europe;
- v) To counteract the strategic and procedural advantages of SMS firms, the CMA should update the Draft Guidance to establish expectations from the outset that CBEs available in defence of CR breaches will only be applied in exceptional circumstances;
- vi) Early enforcement actions in respect of CR breaches must establish a high standard for the CBE to be met because this will, through appeals, set the precedent that will apply for the new regime in the long term. This will incentivise SMS compliance with CRs and maximise their effectiveness;
- vii) Concurrency arrangements between the CMA and other regulators should be reviewed as a priority, with particular attention given to memorialising cooperation on issues at the intersection of digital and financial services (but also consumer protection issues, and market interventions in light of new enforcement powers);
- viii) Issues identified by the FCA/PSR as impacting competition in financial services cannot be overlooked in light of the CMA's prioritisation decisions (recognising that the CMA has duties to all sectors of UK consumers); and
- ix) The CMA should commit to co-ordinate activity with the wider regulatory community through a multi-year roadmap and to rationalise overlapping initiatives.