



TikTok's Response to the CMA's Consultation on the Draft Guidance on the Digital Markets Competition Regime

1 About TikTok

- (1) TikTok is a global entertainment platform whose mission is to inspire creativity and bring joy. Since the current version of TikTok was launched in the UK in 2018, TikTok has grown into a platform with tens of millions of UK users, embracing our platform as a creative outlet, a source of entertainment and a way to explore new content. By providing a vibrant alternative to incumbent platforms, TikTok has introduced fresh competition and injected dynamism into the digital landscape. As part of our innovative mission, we are proud to be directly investing in the UK. Our first permanent office in Europe was in London and we have continued to invest in the UK. We currently have multiple offices in London, employing thousands of people.
- (2) TikTok is one of many outlets for users to share entertaining and inspiring content and competes with a wide range of digital platforms in offering online advertising. We are also continuously looking to expand and develop new products and services, such as TikTok Shop (an e-commerce feature that allows brands, merchants, and creators, including many UK small businesses and entrepreneurs, to sell products directly on the platform).
- (3) TikTok has been pleased to have constructive interactions with the Competition and Markets Authority (the "**CMA**") on a number of previous cases, and welcomes the opportunity to contribute to the consultation by the CMA on the draft guidance on the digital markets regime set out in the Digital Markets, Competition and Consumers Act 2024 (the "**DMCC**") (CMA 194con DRAFT) (the "**Guidance**") and on the draft guidance on the mergers reporting requirements for SMS firms set out in the DMCC (CMA 195con DRAFT) (the "**Mergers Guidance**").
- (4) TikTok is particularly well placed to comment and provide insights on the draft Guidance. We have a number of touchpoints with various large digital platforms, including as a competitor, but also as a leading app developer or potential customer or business user. This provides TikTok unique insight on how the Guidance can best be structured and applied in practice.

2 Observations on the Guidance

- (5) TikTok strongly believes that thoughtfully designed and appropriately implemented digital platform regulation has the potential to deliver tangible benefits to UK users and businesses. The architecture of the Strategic Market Status regime (the "**SMS Regime**") established in the DMCC provides a strong foundation on which to achieve these goals. In comparison to the prescriptive nature of the EU's Digital Markets Act (the "**DMA**"), the SMS Regime's flexible structure puts the UK in a position to be a world leader in targeted, effective, and

proportionate platform regulation, ultimately supporting innovation and growth in the UK economy.

(6) The approach outlined in the Guidance codifies a number of key benefits of the SMS Regime, namely:

- **Proportionate:** The SMS Regime represents a proportionate approach to digital regulation as it targets the small group of firms who have an outsized impact on the wider economy (e.g. those with substantial and entrenched market power). When judging whether a firm has substantial and entrenched market power, TikTok supports the Guidance's indication that the CMA will look holistically at a variety of evidential sources – e.g. in particular, the Guidance is correct to focus on firms' profitability / ability to monetise users, potential for user switching, network effects, ecosystem integration, economies of scale and data advantages as evidence of strategic market status. The DMCC and the CMA's Guidance are right not to simply focus on the mere size of a firm, but instead whether a firm truly holds a strategic and durable position that gives rise to the specific concerns the DMCC is meant to address.
- **Tailored:** The SMS Regime also provides for a bespoke approach to digital regulation with each designated firm having its own code of conduct. The SMS Regime avoids a one-size-fits-all approach and seeks to target specific concerns in relation to each designated firm. The Guidance delivers on this promise, by setting out a roadmap for how codes of conduct will be formed and the degree to which they will be firm-specific.

(7) In the rest of this response, we provide feedback on aspects of the Guidance we believe could be further clarified or enhanced. Our comments focus on three key topics: procedure, designation and enforcement. Within these topic areas, our feedback can be summarised along the following key themes:

- **The importance of legal certainty and predictability:** the Guidance provides some details on the proposed procedure for designation, codes of conduct / pro-competition interventions ("PCIs") and enforcement, but it could go further to provide clarity on how these processes will work in practice. This is important not only to protect the procedural rights of any designated entity, but also to ensure that interested and informed third parties can engage with the CMA in a timely and effective manner. Allowing all stakeholders sufficient time to respond to CMA requests is similarly important. Providing clear timetables and building in time for meaningful consultation will allow the CMA to collect useful feedback from a variety of impacted parties. This third-party input will be critical to ensuring that the SMS Regime and the DMCC deliver their full potential. As a corollary to this, to ensure that the CMA receives the key information it needs from relevant stakeholders in an efficient and timely manner, it is important that information requests and document retention obligations are not disproportionate or unduly burdensome on firms.
- **Preserving the tailored approach to the SMS Regime:** the CMA's initial designation decisions and codes of conduct will have outsized importance given the lack of precedent. The CMA should take care that its initial actions under the SMS Regime do not become a broad brush *de facto* standard going forward. We would encourage the CMA to use the tailored approach afforded to it under the DMCC and ensure that it imposes the right obligations on the right firm. A one-size-fits-all

approach may lead to unintended consequences and risk over-intervention which may stymie innovation and lead to worse outcomes for UK users. One sees suggestions of this in the EU DMA experience, where the European Commission often struggled to apply obligations clearly designed for one gatekeeper to a wide range of platforms and business models.

- **Ensuring the SMS regime is user first:** Actual user outcomes and experiences should be the touchstone of any intervention taken by the CMA. Such intervention should be proportionate, targeted and only occur where it is likely to effectively address a clear harm to users. In certain places, the Guidance risks veering from this principle – for example, with the inclusion of the indispensability test in assessing the countervailing benefits exemption. TikTok strongly believes that a focus on outcomes for UK consumers will help the regime be implemented in a way that supports innovation and growth of the UK economy.

3 Greater procedural clarity

- (8) TikTok appreciates that the Guidance provides for consultation on key decisions as an important procedural safeguard. To build upon this framework, we would encourage the CMA to provide greater clarity on the timeline and process for designating firms, determining the codes of conduct, imposing PCIs and investigations. Further information on the timescales for evidence gathering, provisional findings and any hearings (including the involvement of CMA decision makers) would be helpful for all stakeholders, whether they be designated firms, interested third parties, or the CMA itself.
- (9) Enhanced and detailed clarity from the CMA on the expected administrative timetables for these investigations is especially crucial for interested or impacted third parties who are otherwise on the “outside” of any investigation.
- (10) In particular, we would welcome further clarity on the following points:
 - **Evidence-gathering.** Third parties can provide industry knowledge and data the CMA may not otherwise have access to, facilitating better outcomes. It is critical that they: (i) have sufficient clarity about processes to know when and how to effectively engage; and (ii) have ample time to provide meaningful responses.
 - **Provisional decisions on designation, codes of conduct and enforcement.** The CMA should provide a clearer indication of when it will issue its provisional decisions, and commit to issue provisional decisions sufficiently early in the process to allow for meaningful engagement. This will ensure that provisional decisions do not become final decisions in all but name. The Guidance should also make clear that third parties will have sufficient time to respond and meaningfully engage with provisional decisions.
 - **Oral hearings.** Additionally, the Guidance should provide clarity on whether third parties (as well as designated firms) will have the right to make oral representations in any CMA investigations.
 - **Access to decision makers.** As with oral hearings, the Guidance would benefit from providing greater clarity on whether and when third parties (as well as designated firms) will have the ability to make their case directly to decision-makers and on what the mechanism for taking decisions will be.

4 SMS designation

- (11) Whilst TikTok recognises the Guidance’s careful balance between specificity and flexibility, there are some key areas regarding the SMS designation process where the Guidance could provide a clearer steer to businesses.

4.1 Scope of a “digital activity”

- (12) We agree with the CMA’s approach of retaining flexibility when determining the scope of a “digital activity”. That being said, it is important that the digital activity in question is described with enough specificity so that those seeking to rely on conduct requirements (“CRs”) understand where an SMS firm’s obligations start and end.
- (13) By its own admission, the European Commission has struggled to delineate the core platform services outlined in the EU’s DMA due to unclear interpretations of what activities should and should not be treated together (e.g. online social networking and video-sharing services). A broader analysis, including consideration of how the relevant services operate, will enable the CMA to arrive at sensible and logical conclusions, rather than try and apply prescriptive and inconsistent categories. Such an approach should yield better and more consistent results that do not unintentionally hinder innovation or unduly restrict firms from engaging in clearly integrated business activities. To the extent that the CMA delineates between different digital activities, the CRs should not impose unduly burdensome requirements vis-à-vis the separate activities that result in artificial siloing of connected services, which risks having a negative impact on user experience.
- (14) The Guidance also allows the CMA to treat two or more of a potential SMS firm’s digital activities as a single digital activity for designation purposes, and to conduct the assessment of whether market power is “substantial and entrenched” on the basis of the grouped activities. While again, flexibility is critical, it is important the CMA ensures this does not become a back-door for the CMA to designate and / or impose CRs on activities in which the relevant firm does not hold substantial and entrenched market power or where the grouped service does not clearly reinforce that market power. This would place burdens that hinder, rather than support, contestability and innovation, and in particular hinder the ability of designated firms to pro-competitively enter adjacent spaces to contest other SMS incumbents. If the CMA decides to adopt this approach, then any CRs imposed should be appropriately tailored to manage the fact that the SMS designation applies to activities in which there is no substantial and entrenched market power. Guidance should protect against the temptation to sweep up services that do not contribute to wider competition concerns, and avoid broadening single-service scenarios best analysed under traditional competition law principles.

4.2 “Substantial” and “entrenched” market power

- (15) The Guidance currently states that evidence of substantial market power will generally support a finding that market power is entrenched. However, the inclusion of the words “substantial” and “entrenched” in the legislation indicates that each should be assessed separately. The Guidance should make clearer that these are two distinct and necessary requirements for SMS designation.
- (16) An assessment of whether market power is “entrenched” is an important – and separate – assessment, as a firm should only be designated if it has held substantial market power for a sustained amount of time. Given the fluid and fast-moving nature of digital markets, it is feasible that a company may experience strong growth for a short period of time, or an

innovator may enjoy market power by virtue of the fact that it enjoys a first mover advantage, having pioneered a market. In such cases, a designation would not be appropriate given any market power would be transient, chased by fast followers. It is also important to avoid premature intervention in dynamic markets where competition is fluid and it is not clear how certain digital products or services will perform, as this could undermine, rather than serve, an unfolding competitive process. False positives could also lead to designation revisions being required before the expiration of the five-year period, leading to frequent hindsight-based reassessments that would undermine confidence in the regime.

- (17) With regard to any “forward-looking assessment”, TikTok would encourage the CMA to look at multiple pieces of evidence, including economic evidence, and relevant past and present data. This 360-degree view would reduce the risk of any assessment being speculative and requiring the CMA to “predict the future”, which would be extremely difficult in such fast-evolving and dynamic markets.

5 Need for a proportionate and efficient approach to enforcement

5.1 Repeat investigations or frequent changes to the CRs would undermine the regime’s effectiveness

- (18) Whilst the agile and flexible nature of the regime is one of its strengths, it is important the regime is administered in a way that provides predictability to designated firms and third parties alike. If designations or CRs change regularly, this risks undermining regulatory stability and confidence in the regime. Ultimately this is likely to reduce the regime’s effectiveness because third parties seeking to rely on CMA interventions will worry about building businesses on the back of requirements which could change at short notice.
- (19) The Guidance gives no assurances around any limits on the CMA’s ability to launch successive designation investigations or conduct investigations. It also suggests CRs may be frequently revised over time.
- (20) Therefore, the Guidance should have a general commitment not to subject firms to repeat investigations or to amend CRs “as a matter of course”. Rather, these should be “by exception” and part of a holistic review. Early CMA decisions and the announcements around them will be particularly important to ensure certainty and confidence in this respect.

5.2 Information requests and document retention

- (21) As noted above, TikTok would encourage the CMA to ensure that its information requests have realistic deadlines and do not create undue or disproportionate burdens on firms. The Guidance appears to acknowledge this (5.16) which is helpful, but it could go further to make this clearer throughout the document (e.g. by providing a clearer indication of the timetable for enforcement action).
- (22) With regard to document retention obligations, the Guidance appears to interpret the legislative obligation to retain documents extremely broadly. TikTok is concerned that such a broad obligation will be difficult to comply with in practice. Further guidance on when a firm could “suspect” it may become subject to an investigation would be helpful.

5.3 Fining methodology

- (23) The CMA should clarify in what situations it may consider it appropriate to deviate from its standard fining methodology. It is important that firms are provided enough information from the Guidance so that they can develop an understanding regarding potential fines.

6 Observations on the Mergers Guidance

- (24) With regard to the Mergers Guidance, further clarity would be helpful regarding the scope of the merger reporting obligations. In particular, further guidance on the amount of information that is required in order to start the five-day Waiting Period would be beneficial for all parties. The CMA may also wish to consider providing for a “short-form” notice (i.e. with shorter disclosure requirements) where the target in question has no clear link to digital markets.

7 Concluding remarks

- (25) Overall, TikTok welcomes the Guidance and the Mergers Guidance. Both documents provide clarity and detail on how the CMA will use its powers under a novel regime that carries significant importance for the future of digital markets. In order to ensure the DMCC and SMS Regime are used to their full potential and foster fair outcomes for all, we encourage the CMA to retain flexibility under the regime, whilst at the same time ensuring procedural fairness that provides legal certainty and predictability for all stakeholders.
- (26) We look forward to further engagement with the CMA as its approach under the DMCC and SMS Regime develops. If any of the points raised in this response are unclear, we would be happy to discuss further.