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Competition and Markets Authority By email: DMGuidance@CMA.gov.uk

Consultation on digital markets competition regime guidance (non-confidential version)

To whom it may concern,

Trainline welcomes the opportunity to respond to the Competition and Markets Authority's (the "CMA") consultation on its draft digital markets competition regime guidance under the Digital Markets, Competition and Consumers Act (the "Act").

Trainline is a British listed tech innovator, offering customers around the world a leading independent travel platform to purchase rail & coach tickets from over 270 operators across 40 countries. Through our highly rated website and mobile app, people can seamlessly search, book and manage their journeys all in one place. We help customers find the best value fares for their journey, alongside smart, real time travel information.

Trainline's response to the consultation is set out in detail below.

1. Strategic market status ("SMS") and SMS investigation procedure

We understand that the CMA intends to undertake a limited number of SMS investigations annually. It is therefore essential that there is appropriate prioritisation of the markets to be investigated, and that stakeholders are afforded the opportunity to comment on which markets these should be. We consider that evidence provided by stakeholders should be one of the considerations for the CMA in terms of the basis for launching an investigation at section 2.68 of the Guidance.

If the CMA is unable to launch investigations into all the markets where it has concerns regarding competition, we consider that it should publish information about which other areas, firms or markets it may intend to focus on in future. Such transparency would benefit smaller challenger firms by providing insight into the CMA's thinking in terms of future areas of potential investigation and appropriately incentivise SMS who may operate in in such areas or markets.

2. Conduct requirements

We welcome the flexibility that is envisaged with conduct requirements ("CRs") so that they can be tailored to address specific competitive harms effectively. We also support the approach of the CMA working on CRs alongside other investigations, which will increase efficiency and ensure a more holistic outcome.

It is essential that there is as much consultation as possible with stakeholders on CRs, before, during, and after their implementation, in order that they command the confidence of challenger firms.

We see merit in workshops with the relevant parties, in a similar approach to the one taken in the EU, which has proven fruitful to date. Making this into a collaborative process as far as possible, rather than being presented with a finalised solution, will serve to bolster the confidence of challenger firms in the remedies. However, it must also be true that such workshops are not seen as a replacement for strong enforcement by the authority or manipulated by SMS to be mere optical illusions of compliance and good faith cooperation.

In terms of the implementation period for CRs, we would hope and expect that, where they are found to be necessary, this period is kept as short as possible. We note and support the intention to consult on any implementation period, however it would help to see guidance on the potential duration of processes for implementing and imposing CRs. This is particularly important to ensure challenger firms have the confidence that the system is not gamed to delay bringing in compliance measures.

It is important that the CMA has the power to (and is prepared to) reject or require changes to an SMS firm's implementation plan for CRs. We would hope and expect that the CMA would seek to secure broad agreement across relevant impacted stakeholders before approving them.

3. Pro-competition interventions

Clarity of content

Although we welcome that the CMA has multiple pro-competition enforcement powers, it is unclear how Pro-Competition Interventions ("PCIs") differ from CRs and how the CMA will decide whether a CR or PCI is needed. Clear criteria and guidelines are necessary to delineate when a PCI is more appropriate than a CR and vice versa (or a combination of both). We seek clarification on the timelines for issuing CRs and PCIs. Consistent and clear timelines will ensure interventions are timely and effective in addressing competitive harms.

Conduct in relation to challenger firms

The intention of the Act is to redress the balance between SMS and challenger firms to ensure a level playing field in which challenger firms can fairly compete, driving innovation and investment in the market which ultimately benefits consumers. Yet, the CMA guidance largely focuses on the relationship between the SMS firm and the consumer.

If the Act is to effectively and sustainably achieve this ambitious aim, we recommend that the CMA guidance make clear that conduct by a SMS firm vis-à-vis a challenger firm is equally capable of falling within the scope of the Act, in particular under section 20(3)(c). The draft guidance contemplates this in relation to barriers to entry (paragraph 3.14) and Trainline agrees with this approach. However, we suggest that the guidance be expanded to address, as a minimum, the requirement for:

- 1. Parity between SMS firms and challenger firms:
 - The guidance should prescribe certain features that are expected in any SMS firm - challenger firm relationship. In compiling these standards, we recommend the existing abuse of dominance case law on parity of offer and supply standards is used as a reference.
 - The guidance should include commitments in relation to data sharing between SMS firms and challenger firms, including in which circumstances data sharing is expected. For example, in the rail retail sector, this should include data on fares, timetable, seating, real time data on delays/cancellations to ensure parity of access and remove the risk of selfpreferencing. This is something that could be enforced through voluntary commitments. Currently, the Rail Delivery Group has a monopoly over the

provision of rail industry data. A requirement for Train Operating Companies to supply this information to retailers would remove retailers' reliance on the industry body for access to a vital input for operation of their business.

2. Prohibition on restrictive barriers to market entry:

 The guidance should expressly prohibit SMS firms from enabling barriers to market entry, and ensure open market access for all challenger firms, in line with existing competition requirements.

4. Investigatory powers

Countervailing benefits exemption

The intention of the Act is to create, maintain and regulate a level playing field, ensuring fair competition for all. The countervailing benefits exemption circumvents this intention, by permitting a SMS firm to justify anti-competitive behaviour if there is a demonstrable customer benefit. An SMS could also exploit the process to argue for the countervailing benefits exemption in prolongation of the harm to the market, even where such request is unlikely to prevail.

To ensure that the countervailing benefits exemption is not used by SMS firms as a way to justify anti-competitive conduct that would otherwise breach the Act's requirements to the detriment of UK consumers, we recommend the publication of more detailed standards that must be satisfied before a SMS firm can avail of the exemption. These standards should include a requirement that the conduct must result in the elimination of a detrimental impact for consumers and so realise a relevant customer benefit that is sufficiently material as to be proportionate to the conduct in question, which the SMS firm must quantify and demonstrate.

It should be insufficient for the SMS firm to only demonstrate that the conduct results in generic consumer efficiencies (for example, increased consumer choice). We recommend the standards mirror those already adopted by the CMA for merger and control analysis under the Enterprise Act 2002,¹ and in particular the pre-existing standards around the use of 'efficiencies'.

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¹ See Merger Assessment Guidelines 2021.

Trainline otherwise agrees with paragraph 7.68 of the CMA's draft guidance which proposes to treat the question of whether the benefits could not be realised without the conduct in a manner similar to the test for indispensability under the Competition Act 1998. This threshold should remain undiluted to ensure that the countervailing benefits exemption only applies where conduct is strictly necessary to achieve such benefits.

Voluntary commitments

Under the Act, as part of a conduct investigation, a SMS firm may make a voluntary commitment to change its behaviour, and in so doing avoid a ruling that the SMS firm has acted in breach of the Act's requirements. This means that until a conduct investigation is launched, the SMS firm can act in an anti-competitive manner in breach of the Act's requirements, but subsequently avoid a finding that it is in breach by offering a voluntary commitment(s). If voluntary commitments are used widely by SMS firms, it will dilute the impact of the Act, meaning consumers will not benefit from the full potential of the benefits the Act intends to ensure.

Whilst Trainline agrees with the CMA's draft guidance on this point (in particular the requirement for public consultation), we recommend that the guidance be bolstered to ensure that:

- any voluntary commitment must be specific and explicit in how it will address the conduct which otherwise breaches the Act's requirements. There must be a requirement for there to be causality between the voluntary commitment and the infringing conduct; and
- 2. whilst recognising voluntary commitments can be efficient and ensure problems are resolved more quickly (thereby enabling consumer harm to be remedied more quickly), even though SMS firms are not required to admit the conduct in question breaches the Act's requirements, voluntary commitments should require the SMS firm to acknowledge that the conduct may have, or is likely to have had, a detrimental impact on consumers without admitting the Act's requirements had been breached.

Trainline otherwise firmly supports paragraph 7.84 of the Draft Guidance in its requirement for public consultation on voluntary commitment.

Upon identification of the infringing anti-competitive behaviour and the agreement of and subsequent implementation of the voluntary commitment, there should be prescribed protections to ensure that the ongoing negative impact on competition is limited.

For example, a time limit imposed on the SMS firm to agree and implement the voluntary commitment, clear explanation of how the commitment addresses the specific conduct in question, a description of how the SMS firm proposes to assess the success of the commitment in addressing the relevant competition impacts, and clearly iterated consequences if the SMS fails to adequately implement the voluntary commitment. A mechanism to ensure ongoing monitoring or efficiency of the commitments in remedying the harm is also key.

5. Monitoring

The monitoring of compliance, effectiveness, and whether to impose, vary, or revoke competition requirements needs to be robust and transparent. The CMA's approach should include clear metrics and regular reporting which is publicly available to ensure that SMS firms are held accountable and that competition requirements achieve their intended outcomes.

It should be possible for challenger firms to formally engage with the CMA if the monitoring process shows any requirements imposed or commitments offered are not achieving the intended outcomes. This is also the case if the challenger firms consider that the requirements are not working in full or in part. We also support the expectation for SMS firms to proactively notify the CMA of any compliance issues that they see.

SMS Reporting obligations

Under the Act, the CMA will only have oversight of a SMS firm once it has been designated as a SMS firm and the date for that SMS firm to comply with the Act's requirements has been reached (the "Compliance Date").

Once the Compliance Date has passed, the CMA only has oversight once it becomes aware of infringing conduct, i.e. the conduct has already occurred. This means that the CMA would have to challenge infringing anti-competitive conduct that had already occurred which is likely to result in ongoing consumer harm as the investigation progresses. The difficulties regulators have in challenging anti-competitive conduct that has already occurred – and

dominant firms able to continue their conduct pending the outcome of potentially long investigative periods – is evident in Europe where the European Commission is dealing with these challenges under the Digital Markets Act enforcement.

To address these risks, we recommend the guidance be extended to include a reporting obligation on SMS firms to report to the CMA on material points identified by the CMA as features of the SMS firm's designated status and market power, and that this information is publicly available. There is precedent for this in the energy sector with OFGEM requiring its designated firms report to OFGEM in this manner as well as reporting obligations in the EU under the Digital Services Act.

6. Enforcement, penalties and administration

We welcome the proposed approach to enforcement and penalties. Effective enforcement mechanisms and appropriate penalties for non-compliance are crucial. The CMA should outline the range of penalties and the criteria for their application to ensure that SMS firms are adequately deterred from breaching competition requirements.

We remain available to discuss any of the above in further detail as required.

Yours sincerely,