

# Guidance on the mergers reporting requirements for SMS firms

CMA195

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# 1. Introduction

## Overview

- 1.1 This guidance provides general information and advice to companies and their advisers on the merger reporting duty set out by the Digital Markets, Competition and Consumers Act (the **DMCC Act**).
- 1.2 The DMCC Act establishes a new digital markets competition regime, giving the Competition and Markets Authority (**CMA**) functions in relation to the regulation of competition in digital markets. Strategic market status (**SMS**) designation is the gateway into the digital markets competition regime – only an undertaking designated as having SMS in respect of a digital activity will be within the scope of the regime (an **SMS firm**). In order to designate a firm as having SMS, the CMA must undertake a formal investigation.<sup>1</sup>
- 1.3 SMS firms and, where an SMS firm is part of a group, any member of that group,<sup>2</sup> have a duty to report certain acquisitions of shares and/or voting rights in targets that have a UK nexus, known as ‘reportable events’, prior to completion.<sup>3</sup> This duty includes a standstill requirement that prevents completion of these arrangements for a short period of time, during or after which the CMA may decide to open an investigation. An SMS firm, and any member of the group to which that SMS firm belongs, are collectively referred to in this guidance as **SMS Acquirers**.
- 1.4 Since the CMA would conduct any merger investigation under the Enterprise Act 2002 (the **Act**), this guidance should be read alongside the [Guidance on the CMA’s jurisdiction and procedure \(CMA2\)](#) and the CMA’s guidance on [Interim measures in merger investigations \(CMA108\)](#).

## Content of the guidance

- 1.5 This guidance sets out which undertakings are covered by the duty to report (Section 2) and what amounts to a reportable event (Section 3). It then outlines the process for submitting a report (Sections 4 and 5) and describes

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<sup>1</sup> For information on the SMS designation, see Chapter 1 of the [Digital Markets competition regime guidance](#).

<sup>2</sup> Section 117 of the DMCC Act explains the concept of a group for the purposes of the DMCC Act.

<sup>3</sup> In practice, the CMA generally expects a reportable event will be an arrangement(s) resulting in the acquisition of shares/voting rights (in exchange for money or otherwise). However, the concept of a reportable event is wider and could include situations where no new shares or voting rights are acquired but the relevant percentage threshold for ‘qualifying status’ is met, for example as a result of a share buyback scheme by the target which reduces the overall issued share capital. This guidance uses the terms ‘acquisition’ and ‘arrangement’ throughout to refer to reportable events, which are described further in Section 3.

the provisions for enforcing the reporting requirement under the DMCC Act (Section 6).

## 2. Scope of duty to report mergers

- 2.1 The duty to report only applies to SMS Acquirers.<sup>4</sup> This duty can be discharged by any member of the SMS firm's group or by their authorised representative (such as a legal representative).<sup>5</sup>
- 2.2 Where more than one member of an SMS firm's group is required to submit a report in relation to the same arrangement, they can choose to comply with their obligations by submitting a joint report to the CMA.<sup>6</sup>
- 2.3 The duty to report is not limited to acquisitions related to the digital activity in respect of which an SMS firm is designated.<sup>7</sup> Rather, it applies to all reportable events carried out by SMS Acquirers, regardless of the area of activity.

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<sup>4</sup> Section 57(1) of the DMCC Act.

<sup>5</sup> Section 65(1) of the DMCC Act. A notice of the authorisation signed by an officer of the relevant undertaking (or group) must be given to the CMA. Such authorisation may be revoked at any time (section 65(2) and (3) of the DMCC Act).

<sup>6</sup> Section 61(1) of the DMCC Act.

<sup>7</sup> See Chapter 1 of [Digital markets competition regime guidance](#).

### 3. Reportable events

- 3.1 The DMCC Act requires SMS Acquirers to report certain arrangements (a 'reportable event') to the CMA before the arrangements take place. The criteria under the DMCC Act to determine what qualifies as a reportable event aim to capture sizeable arrangements involving UK-connected bodies corporate over which the CMA may have jurisdiction.<sup>8</sup> The assessment as to whether an arrangement is a reportable event is distinct from the assessment as to whether the CMA has jurisdiction to review an arrangement. The duty to report applies to any arrangement that meets the reporting requirements, although the CMA may ultimately conclude that the arrangement does not meet the jurisdictional thresholds. Similarly, the CMA may have jurisdiction to review an arrangement where that arrangement is not a reportable event.

#### Categories of reportable events

- 3.2 Two broad types of arrangements may be subject to the reporting requirements, provided they meet the relevant thresholds:
- (a) an acquisition of an interest<sup>9</sup> in a target; and
  - (b) an acquisition of an interest in a new joint venture.
- 3.3 These arrangements will be subject to the duty to report where the arrangement:<sup>10</sup>
- (a) results in SMS Acquirers having 'qualifying status';
  - (b) has a nexus to the UK; and
  - (c) meets or exceeds the consideration value threshold.
- 3.4 Each of these requirements is addressed below.

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<sup>8</sup> See Chapter 4 of [CMA2](#), including guidance on what constitutes a 'relevant merger situation'.

<sup>9</sup> Schedule 2 of the DMCC Act includes additional information on the holding of interests and rights including joint interests, joint arrangements, interest held by nominees, rights treated as held by the person who controls their exercise, rights exercisable only in certain circumstances, rights attached to shares held by way of security, and the meaning of arrangement for the purpose of the schedule.

<sup>10</sup> Section 57(2) of the DMCC Act.

## ***Qualifying status***

- 3.5 An arrangement may be reportable where it results in SMS Acquirers having 'qualifying status'. Qualifying status is determined based on the percentage of shares or voting rights the SMS Acquirers will hold following the arrangement.

### *Acquisition of shares or voting rights in a target*

- 3.6 Section 57(2)(a) of the DMCC Act provides that SMS Acquirers will have qualifying status if the relevant arrangement would result in them acquiring a certain level of shares or voting rights in a target. The percentage of the shares<sup>11</sup> or voting rights<sup>12</sup> that SMS Acquirers will hold following the arrangement must increase as set out below:
- (a) from less than 15% to 15% or more;
  - (b) from 25% or less to more than 25%; or
  - (c) from 50% or less to more than 50%.
- 3.7 Successive arrangements between the same parties may trigger the duty to report more than once. For instance, SMS Acquirers will have to submit a report to the CMA before they acquire 15% or more shares/voting rights in a target. Should SMS Acquirers complete this acquisition and subsequently decide to increase their shareholding/voting rights to more than 25% in the same target, irrespective of whether this involves the same seller or not, this would result in a new reportable event triggering a duty to submit a new report to the CMA.

### *Acquisition of shares or voting rights in a new joint venture*

- 3.8 SMS Acquirers may have qualifying status if they decide to form a new joint venture vehicle<sup>13</sup> together with at least one other person that is not part of the SMS Acquirers.

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<sup>11</sup> References to holding a percentage of shares are defined in Section 58(3) of the DMCC Act.

<sup>12</sup> Voting rights are the rights conferred on shareholders in respect of their shares to vote at general meetings of the body corporate on all or substantially all matters (for a body corporate that has a share capital) and the rights conferred on members to vote at general meetings of the body corporate on all or substantially all matters (for a body corporate that does not have a share capital – section 58(3) of the DMCC Act). Where a body corporate does not have general meetings, this includes any rights in relation to the body corporate that have the equivalent effect – section 58(5) of the DMCC Act.

<sup>13</sup> Bodies corporate formed by two or more unconnected parties for the purpose of working together (see the [Explanatory notes to the DMCC Act](#), paragraph 307).



- 3.9 SMS Acquirers will have qualifying status if the relevant arrangement would result in them holding at least 15% of the shares or voting rights in the new joint venture vehicle.<sup>14</sup>
- 3.10 Once the joint venture has been created, the approach set out above with respect to an acquisition of an interest in a target will apply to any future increase in the shareholding/voting rights that SMS Acquirers gain in the joint venture.

## **UK Nexus**

- 3.11 In arrangements involving the acquisition of a target, the reporting requirement only arises where the target (including any of its subsidiaries) whose shares or voting rights are being acquired is 'UK-connected', meaning that it has a nexus to the UK.
- 3.12 The DMCC Act specifies that a body corporate will be UK-connected if either (a) it carries on activities in the UK; or (b) it supplies goods or services (whether for consideration or otherwise) to a person (or persons) in the UK.<sup>15</sup>
- 3.13 In arrangements involving the creation of a new joint venture, the reporting requirement arises where SMS Acquirers expect or intend that the joint venture will be UK-connected. In determining whether SMS Acquirers 'expect or intend' the joint venture to be UK-connected, the CMA considers that all available evidence in the round will be relevant, including R&D projects, pipeline products and internal documents such as business plans.

### ***Carrying on activities in the UK***

- 3.14 The first way in which the UK nexus test can be met is if, pre-arrangement, the target carries on activities in the UK.<sup>16</sup> In the case of the formation of a joint venture, the UK nexus test can be met if SMS Acquirers expect or intend that the joint venture will carry on activities in the UK.<sup>17</sup>
- 3.15 Paragraphs 4.87-4.89 of CMA2, the CMA's guidance on merger jurisdiction and procedure, sets out guidance on what would suggest that the target carries on activities in the UK.

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<sup>14</sup> Section 58(2) of the DMCC Act.

<sup>15</sup> Section 57(5) and (6) of the DMCC Act.

<sup>16</sup> Section 57(5)(a) of the DMCC Act.

<sup>17</sup> Section 57(3)(a) of the DMCC Act.

## ***Supply of goods or services to a person or persons in the UK***

- 3.16 The second way in which the UK nexus can be met is if, pre-arrangement, the target supplies goods or services (directly<sup>18</sup> or indirectly,<sup>19</sup> for consideration or otherwise<sup>20</sup>) to a person or persons in the UK. For a target to be supplying goods or services to the UK, there need to be goods or services being provided from one person to another, and the recipient needs to be in the UK.<sup>21</sup> In the case of the formation of a joint venture, the UK nexus can be met if SMS Acquirers expect or intend that the joint venture will supply goods or services to a person or persons in the UK.<sup>22</sup>
- 3.17 Guidance on the concept of supplying goods or services to a person or persons in the UK is set out in CMA2.<sup>23</sup> The CMA notes, in this regard, that the supply of services includes (amongst others):
- (a) the supply of digital content;
  - (b) the supply of digital services by means of the internet;
  - (c) rendering services to order;
  - (d) the provision of services by making them available to potential users; and
  - (e) making arrangements for the use of computer software or for granting access to data stored in any form which is not readily accessible.<sup>24</sup>

## **Value of the consideration**

- 3.18 The duty to report only arises in relation to an arrangement where the total value of all consideration (whether provided before or as part of the 'reportable event') is at least £25 million.
- 3.19 Consideration encompasses all assets or other measurable economic benefits that (1) transfer from a buyer (ie SMS Acquirers) to a seller, whether directly or indirectly, in relation to an acquisition of shares or voting rights, and/or (2)

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<sup>18</sup> For example through employees.

<sup>19</sup> The target needs to be sufficiently involved in that supply to be said to be making the supply, whether alone or with others, for example through subsidiaries or agents.

<sup>20</sup> For the avoidance of doubt, the UK nexus test can be met if the target or joint venture supplies goods or services free of charge.

<sup>21</sup> For example, this would generally include an overseas company that produces goods for exporting to a company in the UK or is responsible for distributing them to the UK company.

<sup>22</sup> Section 57(3)(a) of the DMCC Act.

<sup>23</sup> CMA2 deals with this condition in the context of the hybrid test at paragraphs 4.90-4.91.

<sup>24</sup> Section 128(3) and (4) of the Act.

are contributed by SMS Acquirers to a new joint venture.<sup>25</sup> Consideration is defined in the DMCC Act as meaning fees, remuneration, assets of any description,<sup>26</sup> liabilities assumed<sup>27</sup> and any other kind of consideration,<sup>28</sup> however provided,<sup>29</sup> including conditional and deferred consideration. Accordingly, this includes, but is not limited to:

- (a) cash;
- (b) publicly traded securities (for example options, warrants or other instruments allowing a holder future access to securities);
- (c) non-publicly traded securities (for example shares, bonds, or other instruments);
- (d) deferred payment or transfer of assets;
- (e) any debt liabilities assumed by the buyer;<sup>30</sup> and
- (f) any other tangible or intangible assets transferred from buyer to seller in relation to (including prior to) the reportable event.<sup>31</sup>

3.20 The CMA would typically expect SMS Acquirers to assess the value of the consideration as at the time the arrangement agreement (such as a Share Purchase Agreement) is signed.

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<sup>25</sup> Where an SMS firm forms part of a group, the consideration contributed by all group members in relation to an arrangement is relevant in calculating the total value of consideration.

<sup>26</sup> Meaning assets transferred from the buyer to the seller to bring about a reportable event.

<sup>27</sup> Meaning debt liabilities assumed (for example, interest bearing liabilities) in line with generally accepted M&A practice.

<sup>28</sup> For example, other kinds of consideration may include arrangements such as the provision by SMS Acquirers of 'payments-in-kind' (ie the provision of goods or services in lieu of cash or other consideration).

<sup>29</sup> Other payments to shareholders in connection with a reportable event may form part of the value of consideration. This may include, for example, significant remuneration packages offered by SMS Acquirers to employ founding teams and other staff who are shareholders in the target prior to the arrangement.

<sup>30</sup> When acquiring a majority shareholding, an acquiring firm will generally assess the 'enterprise value' of a business, which means the value of the business to all of funders (including debt holders and shareholders) regardless of the 'mix' of that funding, ie whether predominantly debt or equity. Adjustments are subsequently made to this 'headline' value to account for the debt of the target business, its cash, and its 'ordinary' working capital position, producing an 'equity value' (representing the value of the business only to shareholders). To the extent that SMS Acquirers assume the debt liabilities of the target, this should be included in the value of consideration. Where this is not the case (such as in the acquisition of some minority shareholdings), debt value may not be included.

<sup>31</sup> Ancillary costs which do not form part of the benefit transferred from buyer to seller to acquire the business, such as legal fees, are not considered to be part of consideration.

- 3.21 Some elements of consideration may be variable in nature and have changing values over time,<sup>32</sup> such as in the case of the transfer of (1) non-publicly traded shares, bonds or other instruments from buyer to seller, (2) other tangible or intangible assets from buyer to seller, and (3) debt liabilities assumed by the buyer. For the purposes of the consideration assessment, the value should generally be determined at the time of the finalisation of any arrangement agreement and on the basis of global financial reporting standards relating to the principle of fair value.<sup>33</sup>
- 3.22 For the purpose of calculating the value of consideration under the reporting requirement, the DMCC Act is cumulative. This means that the value of the consideration includes all consideration that will be provided in exchange for the target's shares or voting rights.<sup>34</sup> As such, this includes:
- (a) the value of the consideration to be provided by SMS Acquirers in relation to a reportable event; and
  - (b) the value of any previous consideration provided by SMS Acquirers in relation to any shares or voting rights already held in the target,<sup>35</sup> regardless of whether the arrangement(s) resulting in the acquisition of those shares or voting rights qualified as a reportable event.

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<sup>32</sup> In such cases, SMS Acquirers should ensure they provide a short summary of how the value of such elements was determined as part of their report (in response to 4(b) on the arrangement value).

<sup>33</sup> See International Financial Reporting Standards (**IFRS**), in particular IFRS 13 Fair Value Measurement.

<sup>34</sup> Section 59(1) of the DMCC Act.

<sup>35</sup> To be measured as at the time of the historic arrangement(s) through which SMS Acquirers acquired their holding of shares or voting rights.

## 4. When to submit a report

- 4.1 SMS Acquirers have a duty to inform the CMA of reportable events before they take place. The DMCC Act sets out that a reportable event is to be treated as taking place when SMS Acquirers become unconditionally obliged to acquire the shares/voting rights (or form the joint venture).<sup>36</sup> The Explanatory Notes to the DMCC Act set out that ‘unconditionally obliged’ means either that there are no conditions that need to be met for the agreement to be executed or that any such conditions have been met.<sup>37</sup> SMS Acquirers must self-assess when to submit a report to the CMA.
- 4.2 SMS Acquirers should not submit a report for arrangements that remain hypothetical. Arrangements potentially leading to a reportable event should be sufficiently advanced and likely to proceed prior to submitting a report.<sup>38</sup> This is to ensure that the CMA does not commit resources to reviewing reports on arrangements that may not ultimately be agreed or are agreed in a materially different form that requires the CMA to reassess the deal.
- 4.3 As a deal progresses, SMS Acquirers should regularly assess whether there are any material changes to the arrangement that could affect whether it is a reportable event or not. For example, if there are changes to the consideration paid for the target or to the level of shareholding or voting rights acquired by SMS Acquirers, this may trigger a reportable event that may not have been envisaged at the outset of the arrangement.
- 4.4 The duty to report does not apply in relation to a reportable event if:
- (a) It does not differ in any material extent<sup>39</sup> from an event already reported under section 57(1) of the DMCC Act;

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<sup>36</sup> Section 64 of the DMCC Act.

<sup>37</sup> Explanatory note 352 on Section 64 of the DMCC Act. For example, an acquirer may become unconditionally obliged to acquire shares/voting rights when any remaining conditions to a share purchase agreement (such as clearance from relevant competition authorities) are met.

<sup>38</sup> In assessing whether an arrangement is sufficiently advanced to submit a report, SMS Acquirers should refer to the CMA’s guidance on submitting a case team allocation form – see paragraph 6.14 of [CMA2](#), which refers to parties being able to evidence a good faith intention to proceed.

<sup>39</sup> Non-exhaustive examples of reportable events that do not differ to a material extent could include instances where the exact acquiring entity within the SMS firm’s group changes, or where the exact value of consideration fluctuates as a result of a change in currency exchange rates or traded share price valuation. On the other hand, a change to the level of shareholding or other changes to the scope of the arrangement (such as whether it includes a board seat or not or relates to the acquisition of the entire target or just certain business activities) would result in a reportable event that differs to a material extent. SMS Acquirers are encouraged to engage with the CMA when considering whether a reportable event differs in any material extent from an event already reported.

- (b) It has already been notified to the CMA through a merger notice under section 96(1) of the Act;
- (c) The CMA has formally begun a phase 1 investigation in relation to it (or a reportable event that does not differ in any material extent); or
- (d) It (or a reportable event that does not differ in any material extent) is subject to a public interest intervention notice or special public interest intervention notice issued by the Secretary of State.<sup>40</sup>

4.5 SMS Acquirers may engage with the CMA prior to submitting a report, just as merger parties often do prior to formally notifying the CMA of a merger. However, it is for SMS Acquirers to determine when to submit a report, and any earlier engagement with the CMA will not constitute the fulfilment of their duty to report.

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<sup>40</sup> See section 61(4) of the DMCC Act. The Secretary of State may make regulations about the duty to report a reportable event – at which point this guidance will be updated. Section 61(5) of the DMCC Act also sets out certain circumstances under which no further action needs to be taken in relation to a reportable event after it has been reported, which include (1) where the Secretary of State issues an interventional notice or a special intervention notice in relation to the event (or an event that does not differ to any material extent), (2) where the CMA issues an initial enforcement order in relation to the event, and (3) where the SMS firm to which the event relates ceases to be a designated undertaking.

## 5. Reporting requirement process

- 5.1 This section explains what information should be included in a report for a reportable arrangement and the process for submitting the report to the CMA.

### Content of a report

- 5.2 The DMCC Act requires the CMA to set out by notice the information that must be contained in a report and the form in which the report should be made. The CMA's notice under section 60(1) of the DMCC Act (the **Notice**) can be found [here](#).
- 5.3 As set out in the Notice, a report submitted by SMS Acquirers must include information on:
- (a) the parties to the arrangement;
  - (b) details of the arrangements;
  - (c) rationale for the arrangements;
  - (d) the activities of SMS Acquirers and the target; and
  - (e) competitors to the target.
- 5.4 In addition to the information required under the Notice, the CMA would encourage SMS Acquirers to submit any other information that may help the CMA to determine whether to investigate the arrangement or to make an initial enforcement order. This can be submitted as an Annex or short note accompanying the report.<sup>41</sup>
- 5.5 The report should be sent by email to the CMA at [SMS.Mergerreporting@cma.gov.uk](mailto:SMS.Mergerreporting@cma.gov.uk). The email should clearly state that the report is submitted under the DMCC Act by using a clear subject line such as 'SMS Transaction Report – [Acquirer / Target]'.
- 5.6 The CMA would generally expect a report to be approximately five pages in length and be more similar to a briefing note<sup>42</sup> than a formal merger notice in

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<sup>41</sup> In line with the CMA's process when receiving briefing notes from merger parties, any additional information provided by SMS Acquirers in addition to the report should be no more than five pages. (Paragraph 3.2 and footnote 5 of Guidance on the CMA's merger intelligence function ([CMA56](#))).

<sup>42</sup> A briefing note is the paper provided to the CMA's mergers intelligence function to explain why merger parties do not propose submitting a formal merger notice to the CMA, see paragraph 3.2 of [CMA56](#). Where a report has

terms of the level and depth of information that should be submitted. SMS Acquirers should consider whether the arrangement in question may warrant a shorter or longer report depending on the facts of the case.<sup>43</sup>

## Process

- 5.7 A reportable event must not take place:<sup>44</sup>
- (a) without a report in relation to the event having been submitted to the CMA; and
  - (b) before the end of the waiting period in relation to the event.<sup>45</sup>
- 5.8 The CMA will give notice confirming whether it accepts that a report is sufficient within five working days (the **Review Period**).<sup>46</sup> The Review Period begins on the first working day after the CMA receives the report (ie the date when the CMA receives the report is Day 0).
- 5.9 Once the CMA has confirmed that the report is sufficient, there is a waiting period of five working days during which the reportable event cannot take place (the **Waiting Period**).<sup>47</sup> The Waiting Period begins on the first working day after the day on which the CMA confirms that the report is sufficient.

### *The Review Period*

#### *Acceptance of a report*

- 5.10 Upon receipt of a report, the CMA will consider whether a report is sufficient and can be accepted. A report will be considered sufficient if it contains all the

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been submitted, the CMA would not expect a briefing note to also be submitted (either at the same time, or at a later stage). Further, given a briefing note cannot replace a report, the CMA would not expect SMS Acquirers to submit briefing notes ahead of submitting a report.

<sup>43</sup> For example, a report concerning complex arrangements, technical products, or a significant number of overlapping activities or links between the SMS Acquirers and the target may warrant a longer report. Conversely, for example, arrangements involving simple products, markets the CMA is already familiar with from recent previous investigations, or no links between the SMS Acquirers and the target may warrant a shorter report.

<sup>44</sup> An agreement to acquire shares or voting rights, or to form a joint venture, will be treated as taking place when SMS Acquirers become unconditionally obliged to acquire the shares or voting rights, or to form the joint venture (see Section 64 of the DMCC Act) – see paragraph 4.1.

<sup>45</sup> Section 63 of the DMCC Act.

<sup>46</sup> A working day is any day other than (1) a Saturday or a Sunday, or (2) a day that is a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971.

<sup>47</sup> This starts the first working day after the CMA accepted that the report relating to the event was sufficient (Section 63(2) of the DMCC Act).



information and in the form as specified in the Notice. The CMA will inform SMS Acquirers via email within the Review Period that the report is accepted.

*If a report is not accepted*

- 5.11 The CMA will consider a report to be insufficient if it does not contain the information requested in the Notice. If the report is insufficient, the CMA will inform SMS Acquirers via email within the Review Period. The CMA will include the reason(s) why it considers the report to be insufficient, for example, by identifying what requested information SMS Acquirers have failed to produce or what information is unclear and requires clarification. SMS Acquirers will be required to rectify and resubmit the report to the CMA.
- 5.12 Once the report is resubmitted, a new Review Period will restart on the following working day (ie the date that the CMA receives the resubmitted report is Day 0).

***The Waiting Period***

- 5.13 Once a report is accepted by the CMA, the five working day Waiting Period will commence. SMS Acquirers cannot complete the arrangement<sup>48</sup> during this Waiting Period unless the CMA gives its consent.<sup>49</sup> In some cases, the CMA may request additional information from SMS Acquirers in order to decide whether to open an investigation,<sup>50</sup> either during the Waiting Period or after (see below).

***Outcomes from the reporting process***

- 5.14 By the end of the Waiting Period, the CMA will inform SMS Acquirers whether (1) it has decided to open an investigation into the arrangement, (2) it is continuing to assess whether to open an investigation,<sup>51</sup> or (3) the CMA has

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<sup>48</sup> See paragraph 4.1 for timing of a reportable event.

<sup>49</sup> Section 63(4) of the DMCC Act gives the CMA the ability to give consent to a reportable event happening before the end of the Waiting Period, and to revoke that consent before the reportable event happens. The CMA would expect to give consent to a reportable event happening when it comes to a view not to investigate a deal (subject to further information coming to light) prior to the end of the Waiting Period. The CMA would generally expect to issue an Initial Enforcement Order in relation to a reportable event (where necessary – see paragraph 5.17 below) rather than revoke consent.

<sup>50</sup> The CMA may request information from SMS Acquirers using its existing information gathering powers under the Act, or by using the information gathering powers set out under section 69 of the DMCC Act.

<sup>51</sup> There may be a number of reasons why the CMA continues to assess whether to open an investigation. For example, the CMA may have further questions for the SMS Acquirer or the target, the CMA may have received further information in relation the arrangement, or the CMA may be seeking information from other regulators. As

been able to determine that it has no further questions about the arrangement at that stage.

#### *CMA decision to investigate during the Waiting Period*

- 5.15 The CMA will decide to investigate an arrangement if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met.<sup>52</sup> The threshold for the CMA to open an investigation is therefore lower than the threshold for reference.
- 5.16 If the CMA decides to investigate an arrangement, it may allow SMS Acquirers the option to notify the arrangement. Alternatively, the CMA will send SMS Acquirers an enquiry letter under section 109 of the Act. The decision on whether to allow notification or to send an enquiry letter will depend on the anticipated timing of the arrangement and the timeframe under which SMS Acquirers propose to notify the arrangement. If completion is imminent, the CMA would typically send an enquiry letter under section 109 of the Act.
- 5.17 Where the CMA decides to initiate an investigation, and where the CMA is not satisfied that the risk of pre-emptive action<sup>53</sup> is low, it is likely the CMA will impose an Initial Enforcement Order (**IEO**).<sup>54</sup>

#### *No decision to investigate during the Waiting Period*

- 5.18 If the CMA has not opened an investigation by the end of the Waiting Period, SMS Acquirers can complete the arrangement. The CMA will nonetheless inform SMS Acquirers whether it may have additional questions about the arrangement.
- 5.19 In some cases, the CMA will inform SMS Acquirers by the end of the Waiting Period that it is continuing to assess whether to open an investigation. In these cases, the CMA may ask the parties to provide further information after

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per the conduct of its mergers intelligence function, the CMA will endeavour to assess whether to open an investigation as efficiently as possible, although this does not preclude further questions at a later stage if further information comes to light (see [CMA56](#), section 4).

<sup>52</sup> This is consistent with the test used by the CMA's mergers intelligence function to determine whether to investigate an arrangement, see [CMA56](#), paragraph 1.2.

<sup>53</sup> Pre-emptive action is action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. This is described in the CMA's guidance on Interim Measures in merger investigations ([CMA108](#)).

<sup>54</sup> For further information on the CMA's approach to IEOs, see [CMA108](#).

the Waiting Period has expired in order to help it determine whether to open an investigation.<sup>55</sup>

- 5.20 In other cases, the CMA will inform SMS Acquirers by the end of the Waiting Period that it has no further questions at that stage. This does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act.

### ***Role of third parties***

- 5.21 The CMA will sometimes send questions to the target business<sup>56</sup> but will rarely send questions to other third parties about a reportable event during the Review Period or Waiting Period. Any such requests will likely relate to information necessary to enable the CMA to understand the nature of the businesses of the SMS Acquirers and the target business, and the sectors in which they operate. Aside from in exceptional circumstances, the CMA will only contact third parties in relation to arrangements that are in the public domain.
- 5.22 Third parties are welcome to set out their concerns about an arrangement to the CMA. Complainants should clearly explain why they believe the arrangement raises competition concerns and, where possible, provide supporting evidence. The CMA may then follow up with the complainant to understand the submission better.
- 5.23 Any information received by the CMA from merging parties or third parties as part of the reporting requirement process will be subject to Part 9 of the Act. The CMA is under a general statutory obligation to protect confidential information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions (including the reporting requirement functions). Only disclosure falling within one of the 'information gateways' set out in Part 9 is permitted.<sup>57</sup>

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<sup>55</sup> For additional guidance on the CMA's information gathering in deciding whether to open an investigation, see [CMA56](#).

<sup>56</sup> For example, the CMA may contact the target where, for example, the CMA is seeking relevant non-public information about the target business, such as pipeline or planned future products or services of the target.

<sup>57</sup> Further information regarding the CMA's confidentiality obligations is contained in: [Transparency and disclosure - statement of CMA's policy and approach: CMA6 - GOV.UK \(www.gov.uk\)](#).

### *Other regulators*

- 5.24 Where an arrangement is subject to review by competition authorities outside the UK, the CMA may request information related to the status of proceedings in those jurisdictions. Merger parties may also be invited to provide waivers to facilitate the discussion of the arrangement between the CMA and those competition authorities.
- 5.25 The CMA routinely consults other (eg sectoral) regulators about any arrangements in which they are likely to have industry specific knowledge. The CMA will take any views it receives from other regulators into account, although it is ultimately for the CMA to decide whether the reported arrangement requires a formal phase 1 investigation.

## 6. Enforcement

- 6.1 The DMCC Act identifies the following forms of non-compliance in relation to the reporting requirement: (1) failure to comply with the reporting requirement;<sup>58</sup> (2) failure to comply with the standstill obligation;<sup>59</sup> (3) failure to comply with a formal information request;<sup>60</sup> and (4) the submission of a false or misleading report.<sup>61</sup>
- 6.2 Where SMS Acquirers have decided not to report an arrangement because they consider that it does not meet the criteria for a reportable event (eg because SMS Acquirers consider that the arrangement lacks a UK nexus, falls below the relevant shares or voting rights thresholds, or involves a level of consideration below £25 million), the CMA may request detailed explanations and evidence to substantiate SMS Acquirers' decision not to submit a report.<sup>62</sup>
- 6.3 More detailed guidance on enforcement and penalties for non-compliance can be found in *Administrative penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

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<sup>58</sup> Section 85(4) of the DMCC Act.

<sup>59</sup> Sections 64(3) and 85(4) of the DMCC Act provide that if a reportable event takes place without a report having been submitted or before the end of the waiting period, each person to whom the duty to report applied in relation to the event is to be treated as having breached the standstill obligation.

<sup>60</sup> Section 87(1)(a) of the DMCC Act. Section 69 in Chapter 6 of the DMCC Act provides the CMA the power to require information for the purpose of exercising, or deciding to exercise, any of its digital markets functions, which includes the merger reporting requirements.

<sup>61</sup> Section 87(1)(b) and (c) of the DMCC Act.

<sup>62</sup> The CMA has a duty to keep compliance with the merger reporting requirement under review – section 68 of the DMCC Act.