

Digital markets competition regime guidance

CMA194resp

Summary of responses to the consultation

19 December 2024

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1. Introduction

Overview

- 1.1 The Competition and Markets Authority (**'CMA'**) has new powers to oversee a digital markets competition regime, as set out in Part 1 of the Digital Markets, Competition and Consumers Act 2024 (the **'Act'**). On 24 May 2024, the CMA published for consultation two pieces of draft guidance on its functions under the Act:
 - (a) Digital markets competition regime guidance.
 - (b) Guidance on the mergers reporting requirement for strategic market status (**'SMS'**) firms.¹
- 1.2 The consultation was open for seven weeks and closed on 12 July 2024. The CMA received 82 responses. This document summarises the key feedback received from respondents to the draft digital markets competition regime guidance, the CMA's views on this feedback and the changes the CMA has made to the draft guidance as a result. This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views, however it does set out the general views received and the most pertinent. Non-confidential responses to the consultation are available on the consultation webpage.
- 1.3 This document should be read together with the final guidance which is published alongside this document. The final guidance has been approved by the Secretary of State on 17 December 2024.

Overview of the consultation responses

Responses received

- 1.4 The CMA received 82 responses to its consultation, which were from a range of stakeholders: large digital firms, other digital firms, trade bodies, legal respondents, economic advisory firms, consumer organisations, publishing industry, academia, think tanks, regulators and civil society. The CMA thanks all those who responded to the consultation on the draft guidance.

¹ See the [CMA's Guidance on the merger reporting requirement for SMS firms](#).

Other engagement

- 1.5 During the consultation the CMA carried out a series of engagements to hear stakeholder views on the consultation and give stakeholders an opportunity to directly engage with the CMA and ask questions. The feedback from these sessions is a useful complement to the formal consultation responses received, particularly where the CMA was able to engage with stakeholders who were unable to provide formal written responses.
- 1.6 The CMA held around 20 meetings and five roundtables with over 50 different stakeholders including: large digital firms, other digital firms, trade bodies, legal respondents, economic advisory firms, consumer organisations, publishing industry bodies, and other industry respondents. These engagements provided valuable insight into a range of different perspectives on the draft guidance. The CMA thanks those engaged with for their time.

The final guidance

- 1.7 The CMA's response to the feedback received is set out in this document which also explains the key changes the CMA has made to the draft guidance as a result.² The CMA has published the final guidance alongside this document, and it takes effect from 1 January 2025.

Statutory Instruments

- 1.8 On 30 July 2024, the government published The Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024 (the '**Turnover Regulations**') for consultation. That consultation closed on 10 September 2024. The Regulations were made on 25 November 2024 and laid before Parliament on 29 November 2024. They enter into force on 1 January 2025 for Part 1 of the Act.
- 1.9 The Turnover Regulations are used for the purposes of calculating turnover for the turnover condition of the SMS test under section 8 of the Act, and for the statutory maxima for penalties under section 90. Accordingly, the relevant sections of the guidance have been updated in line with the final version of the Turnover Regulations. Those changes have only necessitated consequential and descriptive additions to the final version of the guidance.

² The CMA has also made some minor typographical and non-substantive amendments to the guidance.

2. General comments on the draft guidance

2.1 Alongside the specific comments on particular topics which are summarised in Chapter 3 onwards of this document, respondents to the consultation made a number of general comments about the draft guidance as a whole. This chapter summarises and responds to those comments.

Level of detail

Summary of responses

2.2 There were mixed views on the level of detail in the guidance. Many respondents expressed support for the CMA's general approach to the guidance, welcoming that it provided clarity whilst maintaining the CMA's flexibility and discretion in operating the regime. They also set out that this reflected Parliament's intention for the regime. Some respondents identified a distinction between issues to be covered in the guidance and those to be addressed on a case-by-case basis at a later date, once the regime is operational. One respondent added that the CMA should commit to reviewing the guidance after a period of implementation.

2.3 Other respondents, including some economic advisory firms and legal respondents, set out that the guidance should generally provide more detail on how the CMA will operate the regime. Two stakeholders responded that the language in the guidance should generally be more definitive.

2.4 Particular areas on which stakeholders asked to see more detail or clarity in the guidance included on procedures (see below) and on the substantive analysis, evidence and analytical frameworks that the CMA would consider. A few respondents suggested that illustrative examples or a glossary would help parties better understand the guidance.

The CMA's views

2.5 In writing the guidance, the CMA has aimed to strike a balance between providing sufficient detail that parties can understand the CMA's approach to operating the regime, while also maintaining sufficient flexibility to respond to different issues as circumstances dictate, and to evolve its approach over time. The CMA's view remains that this approach will maximise the effectiveness of the regime and reflects the intent of the policy and legislation underpinning the regime. The CMA has however sought to provide more detail and clarity in some specific areas in response to stakeholder feedback. The CMA has also added a glossary to the final guidance.

- 2.6 As has been the case with other CMA guidance, the CMA expects to review and update this guidance as its approach to the regime evolves, for example building in more examples of how the CMA has applied its analytical frameworks in practice. The CMA will keep the case for doing so under review.

Procedure including engaging with stakeholders

Summary of responses

- 2.7 A number of respondents, including large digital firms and legal respondents, signalled a desire for the guidance to set out more detail on various processes under the regime and the timings associated with those processes. This included, for example, the steps and timetables for SMS investigations, pro-competition intervention ('**PCI**') investigations, in setting conduct requirements ('**CR**') and conduct investigations.
- 2.8 Some respondents welcomed the CMA's commitment to engage with a wide range of parties. Others emphasised the importance of this to ensure the CMA's decisions are appropriately informed and asked for more explicit detail on the approach to engaging with stakeholders (including through participative resolution).
- 2.9 Some respondents set out that key stakeholders should have equal rights of access to information and CMA decision-making processes as SMS firms. Conversely, two respondents set out that SMS firms should have access to enhanced transparency mechanisms, to see and comment on the CMA's emerging thinking and evidence provided against them before it becomes public, to ensure their rights of defence.

The CMA's views

- 2.10 The CMA is committed to ensuring that a wide range of stakeholders can contribute to and participate in the operation of the regime. Input from stakeholders will be critical to the success of the regime and will help ensure the CMA's work is well evidenced, informed and robust. In this spirit, and noting respondents' feedback, the CMA has amended the guidance to give greater clarity to stakeholders on the key points at which they will be able to engage in the CMA's processes and what such engagement may involve. Namely, the CMA has added tables setting out the main stages of engagement the CMA expects typically to take place between the CMA and stakeholders in the following cases:

- (a) SMS investigations (see paragraph 2.81)

- (b) Imposing CRs (see paragraph 3.37)
- (c) PCI investigations (see paragraph 4.40)
- (d) Breach investigations (see paragraph 7.8)
- (e) FOM procedure (see paragraph 7.133)

- 2.11 While the tables set out the approach that the CMA will typically take, it may in some cases depart from that approach where it considers it appropriate and reasonable in the particular circumstances and so the specific details and timings of each process will depend on the facts of the particular case. Therefore, in addition to the above, the guidance has been amended across chapters to clarify that, when initiating key processes of the digital markets competition regime, for example SMS investigations, the CMA will publish a case-specific administrative timetable setting out the key steps in the process, confirming the key engagement points, and the timelines associated with them. It will be regularly reviewed and updated as necessary during the course of an investigation.
- 2.12 The CMA is cognisant of the barriers to participation experienced by some parties (for example, shortages of time and expertise) and will seek to identify approaches that ensure the views of such parties can be captured and considered, for example by engaging via meetings and roundtables. The CMA is also committed to ensuring that the regime provides parties with fair access to information. As noted in Chapter 9 of the guidance, the CMA will seek to operate the regime as transparently as possible, while also protecting the confidentiality of those who provide the CMA with sensitive information.

Prioritisation

Summary of responses

- 2.13 Several respondents commented on the CMA's approach to prioritisation under the regime, with some of the view that the guidance should set out more information on this. Several respondents proposed specific issues or remedies for the CMA to consider. Others emphasised that the guidance should say more about how the CMA will prioritise which of its tools to use to address an issue, so as to avoid confusion and risks of 'double jeopardy'.

The CMA's views

- 2.14 The CMA considers that its Prioritisation Principles remain an appropriate baseline framework for considering how it should prioritise taking action under

the digital markets competition regime. The CMA expects to provide more information on its strategy for the regime, and how it will deliver this through its work, in other published documents and speeches – akin to how the CMA already communicates key themes or areas of interest, such as in its Annual Plan. The CMA expects this approach would allow it to provide stakeholders with a more dynamic picture of its areas of interest on an ongoing basis compared with setting this out in guidance.

- 2.15 The CMA's decision on which of its tools to use to address a given issue will be made on a case-by-case basis and in some circumstances, it may be that using a combination of tools is appropriate. There are clear legal criteria for the use of the digital markets competition regime tools: most importantly, that the regime can only address issues relating to a firm designated as having SMS. The CMA is mindful that the rationale for the new regime was that its existing tools were in many cases likely to be inadequate to deal with concerns associated with the market power and position of SMS firms. However, the CMA still expects to make full use of its suite of tools.

Potential regulatory failures

Summary of responses

- 2.16 Several respondents noted general risks that could arise in the operation of the regime, including regulatory instability, harm to investment and innovation and worsened consumer experience in digital markets. Three respondents suggested certain mitigations to these risks, including robust, evidenced-based processes that fully consider consumer welfare and incentives to develop new products, and which engage fully with stakeholders.

The CMA's views

- 2.17 The CMA is acutely aware of the potential risks of ineffective regulation. The regime and the guidance have been designed with avoiding these risks in mind and as such have many safeguards in place. Furthermore, the CMA will operate the regime in an evidence-based, participative, targeted, proportionate and coherent way to ensure that it creates the conditions for competitive, innovative digital markets that deliver good outcomes for consumers.³

³ Indeed, this is reflected in a number of the operating principles that the CMA set out in the [Overview of the CMA's provisional approach to implement the new Digital Markets competition regime](#), see chapter 7.

- 2.18 The digital markets competition regime provides significant opportunities to build a thriving, resilient, sustainable digital economy – one powered by innovation and underpinned by strong productivity growth; and an economy which attracts investment and entrepreneurial ambition from around the world because innovators can be confident that the UK offers a level playing field for fair-dealing business and their investors. Competitive digital markets which enable innovation to thrive are key to supporting productivity and economic growth.
- 2.19 Certainty of a transparent, robust legal framework is key to the success of the regime. The CMA is directly accountable to Parliament for all its work, including the new digital markets competition regime. As part of the CMA’s Annual Plan, we will set out the areas where we plan to focus our digital markets competition work. In the CMA’s Annual Report, which is laid before Parliament, we will describe our work under the digital markets competition regime. This will report our progress against a range of indicators to enable us to be held to account.

3. Strategic Market Status

- 3.1 Nearly all respondents to the consultation commented on Chapter 2 of the draft guidance concerning SMS. There was a balance of feedback with some respondents overall supportive of the approach set out in the guidance, while others sought more detail or proposed an alternative position on particular points.

Identifying a digital activity

Summary of responses

- 3.2 Several respondents reflected that ‘digital activities’ is broadly defined under the Act and stated that it would be helpful for the CMA to clarify and set out in guidance, examples of which sectors, firms or services are likely to be in or out of scope of the regime. One respondent specifically called for the CMA to indicate that the focus of the regime is not on sectors which are already subject to sector-specific regulation.
- 3.3 Feedback on the CMA’s approach to identifying digital activities was balanced. A number of submissions were supportive of the CMA’s flexible approach to identifying digital activities. Others sought greater clarity on the CMA’s assessment framework and relevant evidence for identifying digital activities and products.
- 3.4 Many respondents commented on the CMA’s approach to grouping digital activities:
- (a) A large number of respondents – particularly digital firms and publishing industry respondents – supported the CMA’s use of the ability provided under the legislation to group activities. Some said this would allow for speedier action and more effective engagement with other digital firms. Others noted it should capture activities that interlink or form ecosystems and avoid ineffective CRs due to narrow scopes.
 - (b) A sizeable group of other respondents — particularly large digital firms and legal respondents — sought more information and certainty on the approach to assessing how and which digital activities may be grouped. Some asked for additional clarity on the factors and criteria the CMA will take into account.
 - (c) Several respondents said that grouping should not be used as a backdoor to designate activities where firms do not hold substantial and entrenched market power or where this could impact smaller firms.

- (d) There were a range of other comments on grouping, including requests for the CMA to engage stakeholders in the grouping process and to weigh the effectiveness of grouping against complementary CRs instead.

The CMA's views

- 3.5 As respondents recognised, digital activities have purposefully been defined broadly under the Act to ensure the regime is future-proof. The CMA does not consider it necessary to provide an interpretation of this definition in guidance, beyond that already provided:
- (a) This is not intended to be a regime where all firms need to be able to 'self-assess' whether they are conducting such an activity and identify themselves. Operating a digital activity does not automatically mean that a firm is subject to extra rules or obligations. A firm must also satisfy the other SMS conditions, and have been designated, which only occurs after a fulsome investigation by the CMA.
- (b) Over time, the CMA's case practice will provide examples of digital activities. The CMA does not consider it necessary or appropriate to try and pre-empt that in guidance now. Even providing a non-exhaustive list of products and services which would likely form digital activities could create unhelpful uncertainty around anything not listed, even if these are squarely caught by the definition.
- (c) In terms of whether the CMA will prioritise investigation of certain digital activities, the CMA's Prioritisation Principles already include considering whether the CMA is best placed to act, having regard to, for example, whether other sector-specific regulators may be more appropriate to lead in some cases.
- 3.6 As set out in the guidance, the CMA's approach to identifying digital activities, including when to group activities will be case-specific and the CMA may vary its approach between investigations. The guidance has been updated to include some illustrative examples of when it may be appropriate to group activities. The CMA considers that the revised guidance provides as much detail as is necessary on grouping while retaining the flexibility required to enable the regime to respond to particular cases. Again, case practice will provide examples of how the CMA identifies and groups activities, which the CMA may reflect in future version of the guidance.
- 3.7 The CMA notes the comments on the risks of over-inclusive designation, or grouping being used as a 'backdoor' to designate activities where there is no substantial and entrenched market power. As the guidance sets out at

paragraph 2.16, where the CMA groups digital activities, the SMS assessment applies to the grouped activity as a whole – meaning that the CMA must find that the SMS conditions (including the requirement for substantial and entrenched market power) are met for the grouped activity, rather than for individual elements. The CMA does not consider it necessary to revise the guidance further on this point.

Jurisdiction and turnover

Summary of responses

- 3.8 A handful of responses included feedback on the guidance on section 4 of the Act which sets out the criteria for when a digital activity carried out by a firm is linked to the United Kingdom. Some respondents called for more specific examples of the threshold that the CMA would consider to be a ‘significant’ number of UK users, with some calling for a ‘safe harbour’ number of users below which the criteria would not be fulfilled. Others agreed with the draft guidance that the assessment under section 4(a) of the Act is context specific and that both the absolute and relative number of UK users is important.
- 3.9 One legal respondent queried the CMA’s explanation in the draft guidance of what ‘carries on business’ in the UK means. Another legal respondent asked for further detail in the guidance on the application of the third limb of the UK nexus test in section 4(c) of the Act as to when a digital activity is likely to have an ‘immediate, substantial, and foreseeable’ effect on trade in the United Kingdom.
- 3.10 A small number of respondents sought further detail on how the CMA will apply the turnover condition, including which entities would be included in the calculation of turnover.

The CMA’s views

- 3.11 The CMA does not propose to change how the guidance explains what a ‘significant number of UK users’ is for the purpose of section 4(a) of the Act. The Act provides the CMA with discretion to consider this assessment on a case-by-case basis, reflecting the range of digital activities to which section 4(a) will need to be applied. It would therefore not be appropriate for a quantitative threshold to be set in guidance. Similarly, the CMA does not propose to amend the guidance to provide further detail on how it will apply section 4(c) of the Act, as this is also a matter which will need to be assessed on a case-by-case basis.

- 3.12 The CMA has considered carefully the comments received on the concept of ‘carrying on business’ in the United Kingdom and does not consider that substantive changes are required to the guidance. However, for further clarity, the final guidance does include additional examples of the relevant factors that the CMA may take into account when deciding whether an undertaking is carrying on business in the UK.⁴
- 3.13 As noted in paragraphs 1.8 to 1.9 above, since the publication of the draft guidance, the Turnover Regulations have been laid before Parliament on 29 November 2024 and enter into force on 1 January 2025 for Part 1 of the Act. The CMA's final guidance has therefore been updated to reflect the provisions of the Turnover Regulations, which provide further detail on how the CMA will apply the turnover condition.

The SMS conditions

Substantial and entrenched market power

Summary of responses

- 3.14 Several respondents, primarily large digital firms and legal respondents, commented that the CMA should provide more detail in guidance on its approach to assessing the SMS conditions. This included further detail on the analytical frameworks the CMA will use, the evidence that the CMA will rely on, and the thresholds for substantive tests.
- 3.15 Respondents had mixed views on the need for a market definition exercise when considering market power. Several respondents, including legal respondents, economic advisory firms, industry bodies and one large digital firm set out that the CMA should reconsider its approach of not undertaking a formal market definition exercise as part of its assessment of market power. However, a similar number of respondents, including other digital firms and consumer organisations, expressed support for the CMA not undertaking a formal market definition exercise, highlighting the benefits of flexibility, avoidance of duplication and the drawbacks of market definition when considering dynamic and interlinked markets.
- 3.16 Respondents also had mixed views on the relationship between substantial and entrenched market power and dominance. Several suggested that the CMA either draw on the established legal concept of dominance and apply

⁴ See footnotes 18 and 19 of the final guidance.

relevant case law or provide a more detailed explanation of how substantial and entrenched market power is different from dominance. A similar number of others, however, set out that the CMA should not draw on dominance case law.

- 3.17 Several respondents including digital firms, publishing industry respondents, one legal respondent and a trade body expressed broad support for the CMA's approach to the forward-looking assessment. However large digital firms and some other respondents said that the guidance should include further detail on how the CMA will consider whether market power is 'entrenched'. For some of these respondents this was likely to be particularly relevant in the case of nascent markets or technologies. A number of respondents commented on the types of developments the CMA should consider as part of its forward-looking assessment.
- 3.18 A number of respondents, including large digital firms, trade bodies and legal respondents commented that the CMA appeared to be creating a presumption that if market power is substantial, it is also entrenched, and that this conflated two concepts that should be distinct. Some of these respondents questioned whether this was in line with the statutory intent.

The CMA's views

- 3.19 The CMA has added further clarity into the guidance on its proposed approach to assessing substantial market power. This can be found at paragraph 2.55 and includes some illustrative and non-exhaustive examples of findings that would be consistent with a finding of substantial market power.
- 3.20 While noting the range of views expressed by respondents on the value of market definition, the CMA remains of the view that formally defining a market is neither necessary nor helpful for assessing market power in the context of SMS investigations:
- (a) Firstly, the Act specifically requires that the CMA considers whether a firm has substantial and entrenched market power in respect of a digital activity not a market. Formal market definition encourages a narrow approach in which each product or service is allocated to a specific market making it difficult to consider important interactions within an ecosystem of products. Rather the concept of digital activity has been adopted as a more appropriate focus for considering the activities of firms in digital markets where firms may have developed complex ecosystems of interrelated products.

(b) Secondly, market definition is not a pre-requisite for assessing market power and the relevant evidence can be analysed and interpreted without having formally defined a relevant market. For example, internal documents discussing competitors, views from customers or competitors on substitutes and evidence of customer switching can be analysed without having defined the relevant market. Market shares can also be calculated on multiple different bases and interpreted without concluding on market definition. The CMA already performs market power assessments in the absence of formal market definition exercises in its existing tools, for example in market studies.

- 3.21 On the question of comparisons to the dominance test, substantial and entrenched market power is a distinct legal concept from that of dominance used in competition law enforcement cases. Whilst from an analytical perspective both involve the assessment of market power, as set out above, the scope of that assessment is different, including the fact that dominance is assessed in the context of a defined market and the substantial and entrenched market power assessment is focused on a digital activity. A finding of dominance is not a pre-requisite for finding substantial and entrenched market power. However, where a firm has been found to be dominant in a market, the same factors may also support a finding of substantial and entrenched market power. This clarification has been added to the guidance at paragraph 2.64.
- 3.22 Having considered respondents' views carefully, the CMA believes that the guidance sets out a sufficiently clear framework for assessing whether market power is entrenched. It has made minor clarifications to paragraph 2.56 to clarify the nature of the forward-looking assessment and note that it has particular relevance for the assessment of whether market power is entrenched, but otherwise, it has retained the relevant parts of the draft guidance unamended.
- 3.23 As set out in paragraph 2.54 of the guidance, the CMA recognises that 'substantial' and 'entrenched' are distinct elements and that each must be demonstrated, although there will likely be a common pool of evidence on market power relevant to both. Paragraph 2.62 has been adjusted in the guidance to be clearer that the finding of substantial market power does not in itself create a presumption of entrenched market power, but rather that where the evidence available to the CMA indicates that the potential SMS firm currently has substantial market power and that the foreseeable developments the CMA has assessed do not appear likely to change this, this will generally be supportive (but not be determinative) of a finding of entrenchment. As set out in the preceding paragraphs of the guidance, the CMA will also consider other factors: in particular the potential SMS firm's

sources of market power as part of its assessment of whether market power is entrenched.

Position of strategic significance

Summary of responses

- 3.24 There were mixed views on the level of detail provided in the guidance on this part of the SMS conditions. Some respondents asked the CMA to provide more detail in the guidance on the assessment of the position of strategic significance, setting out that the current guidance does not provide sufficient clarity on how the CMA will determine whether the criteria are met. Respondents made a number of suggestions for refinements to the guidance on individual criteria of the position of strategic significance assessment.
- 3.25 However, others expressed support for the flexible approach to assessing the four criteria set out in guidance, in particular agreeing with not setting specific quantitative thresholds. One of these respondents suggested that the guidance could note the utility in finding more than one of the criteria is met, to facilitate setting appropriate CRs.
- 3.26 A few respondents expressed concerns that the criteria as set out in the guidance are not sufficiently targeted towards conduct that would be harmful to consumers, and risk discouraging dynamic entry by firms into new markets — particularly in relation to the third position of strategic significance criterion (ability to extend market power to a range of other activities).

The CMA's views

- 3.27 The CMA considers that the examples provided under each of the four criteria provide sufficient clarity on how the CMA will evaluate whether potential SMS firms hold a position of strategic significance, while maintaining sufficient flexibility to accommodate case-specific variety.
- 3.28 Regarding the comments on the criteria not being sufficiently targeted towards harmful conduct, the CMA notes that that test is not intended to identify harmful conduct and that SMS designation does not in itself restrict conduct of designated firms.

The CMA's approach to assessing the SMS conditions

Summary of responses

- 3.29 Several respondents welcomed the broad and flexible approach to evidence set out in guidance. Respondents expressed support for the CMA using evidence from previous cases including market studies involving potential SMS firms for its assessment of the SMS conditions. Some respondents commented that the CMA should reassess the value of this evidence in light of evolving market conditions and that SMS firms should be able to make representations or updates to such evidence. One large digital firm commented that relying on and transferring evidence in this way risked undermining firms' rights of defence
- 3.30 Other comments on the assessment of evidence in SMS investigations (beyond the broader requests for more detail discussed above) included mixed views on: the value of internal documents as evidence; the appropriateness of the 'balance of probabilities' standard; and the relevance of evidence from the substantial and entrenched market power assessment to the assessment of the position of strategic significance. Some respondents encouraged the CMA to use evidence from industry participants.

The CMA's views

- 3.31 Regarding use of evidence from previous cases, paragraph 2.78 of the guidance already notes that the CMA will be mindful of when and for what purpose evidence was gathered and consider whether it needs updating or corroborating. This paragraph has been revised to clarify that this will include considering market developments since evidence was gathered, and that there will be appropriate opportunity for parties to provide views on relevance.
- 3.32 The CMA notes the responses regarding the value of different types of evidence. As set out in the guidance, the CMA may rely on a range of quantitative and qualitative evidence depending on the specific circumstances of each SMS investigation and will decide on the weight to apply to different pieces of evidence in that context. The CMA does not consider it to be practical to provide more prescriptive detail on how different types of evidence will be weighted in general, given this case-specific variation.

Procedure of a SMS investigation

Basis for launching an SMS investigation

Summary of responses

- 3.33 Some respondents asked for the CMA to delineate more clearly the circumstances in which the CMA may begin or open a new investigation.
- 3.34 A handful of respondents asked for the guidance to expressly note that submissions from market participants – including complaints – can be one of the grounds on which the CMA may consider launching an SMS investigation. Several respondents also suggested that the CMA should contact directly affected firms in advance of a public launch of an SMS investigation, including to receive feedback on prioritisation.

The CMA's views

- 3.35 In relation to the comments asking for the CMA to delineate more clearly the circumstances in which it may begin or open a new investigation, as set out in paragraphs 2.83 and 2.84 of the guidance, there is a variety of evidence that the CMA might consider when deciding whether to begin an SMS investigation, and it will have regard to its Prioritisation Principles when considering which firms and digital activities to prioritise for investigations.⁵ As such, the decision as to when it may open an investigation depends on a range of factors which will be specific to an individual case, and therefore the CMA does not consider it appropriate to amend the guidance to provide further information on this issue.
- 3.36 The CMA welcomes information from market participants to support its monitoring work, including in relation to firms operating digital activities which should be prioritised for SMS investigations. This is already set out in paragraph 6.15 of Chapter 6 of the guidance on Monitoring. However, for clarity, paragraph 2.83(a) of Chapter 2 of the guidance on SMS, now also sets out that submissions and complaints from stakeholders are one source of information which may be used by the CMA as part of its consideration as to whether to open an SMS investigation.

⁵ The CMA's approach to prioritisation is also discussed in paragraphs 2.13–2.15 above.

The SMS investigation

Summary of responses

- 3.37 Some respondents sought more detail on the procedural approach to an SMS investigation including detailed timetables for key milestones around evidence gathering and decision making in an SMS investigation, or made comments regarding the timing of specific investigative steps. Respondents also sought detail on how and when in the process different stakeholders including third parties will be able to engage, several emphasising this should be early.

The CMA's views

- 3.38 The CMA recognises the importance of stakeholders understanding when and how they will have an opportunity to engage with its investigations. Ensuring there is clarity on this will aid the smooth and efficient running of the investigation which will be key to delivering the SMS decision within the statutory timeline.
- 3.39 The CMA has amended the guidance to add a table setting out the key stages of engagement that the CMA expects typically to take place during an SMS investigation process between the CMA and stakeholders, including potential SMS firms and third parties. The table is intended to aid stakeholders' understanding of how the CMA will typically engage them in its processes, both through the provision of information and to seek their input. It should be read alongside the detailed guidance which sets out the full procedure that the CMA will follow.
- 3.40 The guidance has also been revised to include a commitment to publishing an administrative timetable at the start of the investigation. This will indicate to parties the key procedural steps and opportunities for engagement specific to each investigation. It will be regularly reviewed and updated as necessary during the course of the investigation.

How the CMA will describe a digital activity in its statutory notices

Summary of responses

- 3.41 Several respondents commented on the CMA's approach to describing the digital activity within the statutory notices which it must issue at the point of opening an SMS investigation, and if it decides to designate a firm as having SMS.

- 3.42 Some respondents welcomed the approach for how the CMA will describe the digital activity in such notices. In particular, they supported the explanations in the guidance that the description of the digital activity would be relatively brief and the list of products in scope would be non-exhaustive, especially because it would help ensure that SMS firms are not able to circumvent their obligations.
- 3.43 Others asked for the CMA to take a more definitive and exhaustive approach to the description of the relevant digital activity, particularly in any SMS designation notice. They stated that this would ensure clarity and a shared understanding between the CMA, the SMS firm and third parties, in respect of which products are in and out of scope.

The CMA's views

- 3.44 The CMA considers it is appropriate that at the start of any SMS investigation, the description of the digital activity in the SMS investigation notice will be relatively brief, particularly given that the description of the digital activity may be further refined during the SMS investigation itself. However, to aid clarity, the CMA has amended the guidance at paragraph 2.89 to provide a firmer commitment to providing the firm with examples illustrating which of the main products it currently considers to be included and excluded from the digital activity based on its current business model.
- 3.45 At the end of the investigation, when issuing the final SMS designation notice, the CMA recognises there is a need for greater certainty as to what is caught within the designated digital activity. As such, paragraph 2.107 has been amended to explain that the description of the digital activity in an SMS designation notice will include a list of the products that the CMA considers fall within the scope of the designation at the point when the notice is issued. The SMS firm will need to assess on an ongoing basis during the designation period which of its products fall within the description of the relevant digital activity set out in the SMS decision notice, for example as it adapts products over time, changes the functionality of products or new products are introduced. As such, other products not included in the list may nevertheless fall within the scope of the relevant digital activity. The CMA will be open to discussing the scope of the description of the digital activity, and in particular, its application to new products, with the potential SMS firm during the course of the designation.
- 3.46 The CMA notes the concerns raised by some respondents as to the potential for an SMS firm to seek to circumvent any designation depending on how the digital activity is defined (ie by moving products and/or functionality to avoid falling within the description of the relevant digital activity). The CMA retains

the ability to revise the SMS decision notice if it changes its view of the designated undertaking or digital activity, provided that the undertaking or digital activity remains substantially the same.⁶ In appropriate cases, this power may be used to address concerns around circumvention, and the guidance has been updated to include specific reference to this (paragraph 2.108).

Further SMS investigations

Summary of responses

- 3.47 The CMA received a small number of comments on the draft guidance on further SMS investigations. One respondent welcomed the CMA's statement that it may be able to conduct a further SMS investigation ahead of the statutory deadline. Another noted the importance of the CMA balancing the need for pace against due regard for new evidence.
- 3.48 The CMA also heard support for the position whereby SMS firms cannot seek a further SMS investigation more than once in a 12-month period and one digital firm suggested that additional wording could be added to note that the decision to carry out an early reassessment would be a matter for the CMA's discretion, and it is under no obligation to do so. A trade body suggested that the CMA should not consider revisiting any SMS designation within the first 2 years, otherwise there is a risk this becomes a second appeal procedure. Others disagreed with the 12-month timeframe, arguing it is a disproportionately long time for delaying reassessments especially on the basis of new evidence. One respondent asked for the CMA to clarify how the 12-month period fits with its own monitoring activities.

The CMA's views

- 3.49 The CMA agrees that in respect of any further SMS investigation it will be important to strike the balance between expediency and robust evidence review. The CMA considers that the speed at which any further SMS investigation is conducted will be case specific and that the wording of the guidance which states that the CMA 'may' be able to conduct the further SMS investigation ahead of the statutory deadline remains appropriate in final guidance.
- 3.50 The CMA considers that on balance 12 months is an appropriate time-limit for when an undertaking can ask the CMA to consider early assessment of its

⁶ See section 15(4) of the Act.

SMS designation, allowing it to manage resources appropriately and as such has made no changes to the guidance on this point.

4. Conduct requirements

- 4.1 Nearly all respondents to the consultation commented on Chapter 3 of the draft guidance, relating to CRs. Respondents represented a wide range of stakeholders including large digital firms, other digital firms, legal respondents, economic advisory firms, trade bodies and other industry respondents. Comments included high-level support for the CMA's overall approach to CRs. Responses also focused on issues such as: when the CMA would use CRs and when it would use PCIs; the CMA's approach to assessing consumer benefits; the application of CRs outside of the relevant digital activity; how the CMA would assess the proportionality of CRs and aspects of the procedure for imposing CRs.

Imposing CRs

Summary of key statutory requirements

Summary of responses

- 4.2 A small number of respondents requested that the guidance provide further definitions of the three statutory objectives (fair dealing, open choices, trust and transparency). Some respondents also sought greater detail on particular permitted types of CRs and how the CMA intends to set rules in relation to them.
- 4.3 A large number of respondents commented on the CMA's statutory requirement to have regard to the benefits to consumers it considers would likely result from the imposition of any CRs. Several respondents expressed support for the CMA's consideration of consumer benefits, particularly the indication that the CMA would consider indirect benefits. The two overarching themes in responses to this section related to the definition of 'consumer benefits' and the CMA's assessment of benefits:
- (a) In relation to the definition of consumer benefits: some respondents asked for further, general detail on the definition of consumer benefits or made comments and suggestions about the types of benefits that should be taken into account by the CMA.
 - (b) In relation to the CMA's assessment of consumer benefits: some respondents requested detail on specific, individual issues relating to the factors and evidence the CMA would consider in its assessment.

The CMA's views

- 4.4 The CMA notes some parties' requests for more specific interpretations of the statutory objectives and permitted types. The CMA does not consider the guidance an appropriate place for this. Decisions on how the objectives and permitted types apply to particular digital activities will be made on a case-by-case basis as the CMA considers imposing CRs. The CMA's interpretation of the statutory framework in each case will therefore be set out as appropriate in CRs themselves and/or any corresponding interpretative notes.
- 4.5 The CMA has amended the guidance in response to the feedback provided in relation to consumer benefits, to clarify that the consumer benefits considered may arise in the short term and/or longer term. This change reflects paragraph 178 of the Explanatory Notes to the Act.⁷
- 4.6 The CMA notes suggestions that it include further examples of the types of benefits that it will take into account. The benefits the CMA will have regard to will necessarily vary on a case-by-case basis and the guidance is sufficiently clear on the types of benefits the CMA will consider. The CMA therefore does not consider it is necessary to provide further, non-exhaustive examples of consumer benefits at this stage.
- 4.7 Nor has the CMA made further amendments to the guidance on its approach to assessing consumer benefits. The approach to assessing benefits (including the timeframe over which they will be considered, the weight given to them and the evidence considered in support of them) will vary on a case-by-case basis, dependent on the particular benefits that are invoked in that case.

Deciding to impose CRs

Summary of responses

- 4.8 About a third of respondents to the consultation sought further detail on how the CMA will decide between imposing a CR or a PCI. Some respondents stressed that in providing further detail, the CMA should still retain flexibility to consider the most appropriate remedies on a case-by-case basis.
- 4.9 Several respondents commented on specific factors that should distinguish between the CMA's use of CRs and PCIs. This included their relative speed; their purpose and the types of remedies that could be imposed through them.

⁷ <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/en/220294en.pdf>

Responses were split on whether or not guidance should imply that CRs are softer or less intrusive than PCIs.

- 4.10 A few respondents also sought additional detail on procedural differences including the sequencing, timelines and consultation requirements for imposing CRs and PCIs. Some respondents said that the CMA should be clear that CR and PCI remedies are not mutually exclusive and can be considered in parallel.

The CMA's views

- 4.11 Having considered the responses received, the CMA has made some amendments to the guidance to further emphasise the legal requirements that govern the use of CRs and PCIs. The CMA's view is that any further specificity on this point would not be appropriate at this stage, as the decision about which tool is most appropriate will need to be taken on a case-by-case basis. The CMA will consider the case for adding to the guidance on this issue (for example, to add examples based on case practice) in future.
- 4.12 The CMA notes the requests for further detail on the procedural differences between CRs and PCIs. The CMA has amended the guidance to provide more detail on the procedures for each tool individually. This includes amending the guidance at paragraph 3.37 in relation to CRs and 4.40 in relation to PCIs. The CMA has also committed to publishing a procedural timetable at the beginning of a case, including key engagement points and timelines relevant to the case.
- 4.13 The CMA has added text to the guidance to further clarify that CRs and PCIs can be used in parallel to target different aspects of an issue, and provided an example to illustrate this point.

CRs applying to non-designated activities

Summary of responses

- 4.14 Many respondents commented on the CMA's power to impose a CR that applies to an SMS firm's conduct in activities other than the relevant digital activity. Half of these respondents broadly welcomed the CMA's proposed approach to such CRs. The main points made by respondents related to: the definition of 'materially' as it appears in section 20(3)(c); the analysis supporting the imposition of CRs applying to non-designated activities; the proportionality assessment in relation to such CRs; and the scope for such CRs to prevent circumvention.

The CMA's views

- 4.15 In relation to 'materially': the CMA has made amendments to paragraph 3.15 to more closely reflect the statutory language in section 20(3)(c). A new paragraph has also been added at paragraph 3.16 providing more detail on how materiality will be assessed for the purposes of the permitted type in section 20(3)(c).
- 4.16 In relation to the comments made about the analysis supporting the application of CRs to non-designated activities and the proportionality of such CRs: a new paragraph has been added to clarify that any CRs that apply to non-designated activities will be subject to the same three-step process for designing effective and proportionate CRs as all other CRs.
- 4.17 On using CRs applying to non-designated activities to prevent circumvention: the CMA does not see a need to amend the guidance on this point. However, the CMA will seek to mitigate the risk of circumvention by ensuring the obligations it imposes are clear, enforceable and future-proof.

Designing effective and proportionate CRs

Summary of responses

- 4.18 Many respondents commented on the CMA's three-step approach to designing effective and proportionate CRs.
- 4.19 In relation to considering CR effectiveness (Step 2), respondents provided views on the four principles to determine the appropriate form of a CR:
- (a) Digital firms and other industry respondents were broadly supportive of the discretion the regime offers.
 - (b) Some sought more clarity on the analytical framework the CMA would apply and how the CMA would weigh different considerations. Some respondents said this would help ensure predictability.
 - (c) Some respondents said the guidance should explicitly empower the CMA to adopt more prescriptive CRs from the outset, and where SMS firms have sought to obstruct regulation in the past this should be taken into account. A minority of others expressed the contrary view, that the CMA should start with high-level requirements before moving to more detailed ones.

- (d) Some respondents sought more clarity, such as in relation to the differences between action- and outcomes-focused CRs, and how outcomes will be assessed.
- (e) Some respondents also queried how the CMA would ensure parity of regulation/outcomes across different SMS firms.

4.20 Many respondents commented on the CMA's consideration of the proportionality of any CRs that it proposes to impose (Step 3). The main points raised by respondents were:

- (a) Several respondents supported the CMA's approach to proportionality. However, a few respondents requested further, general clarity on the CMA's assessment. Some respondents disagreed with the sequencing of the process set out in the draft guidance, suggesting that the proportionality assessment should not be left to the end of the CR design process.
- (b) A number of respondents pointed to specific issues they considered the CMA should take into account when assessing the likely effects of CRs, for example: freedom of contract and property rights; privacy; security; user experience, short term versus long term effects; pro-competitive outcomes versus unintended consequences; platform autonomy; impacts on different user groups; and the costs to SMS firms versus the benefits of addressing existing harms to competitors and users.
- (c) Two respondents requested further detail on the types of evidence the CMA is likely to consider relevant when assessing proportionality. Some parties requested more detail on how the CMA will weigh evidence of the impacts of CRs.

The CMA's views

4.21 In response to the requests for more detail on the analytical framework to be applied before the CMA imposes a CR: the CMA notes that the guidance sets out a three-step process that will govern the setting of CRs, within the framework provided by the legislation. The CMA does not see a case for adding more detail on the analytical framework for setting CRs.

4.22 In relation to the request for more clarity on different types of CR, including the difference between action and outcomes-focused CRs, the CMA considers this is already adequately addressed in guidance, in particular at paragraphs 3.28 to 3.29. Furthermore, in relation to respondents' points on the sequencing of CRs under the CMA's four principles, paragraphs 3.29 and

3.30 of the guidance already make clear that the CMA may adopt more detailed and directive CRs from the outset.

- 4.23 The CMA acknowledges requests that the CMA considers SMS firms' historic response to regulation as part of the CR design process. The CMA has amended the guidance in paragraph 3.32 to clarify that the experiences, as well as specifically the actions, of other regulators may, where appropriate, factor into CR design.
- 4.24 In relation to the queries on how the CMA would ensure parity of regulation/outcomes across different SMS firms, the CMA considers this is already covered by paragraph 3.32 of the Guidance where the CMA notes that it will also have regard to the extent to which the CR or combination of CRs is coherent with any other CRs imposed on the SMS firm or on other SMS firms operating in the same or similar digital activities.
- 4.25 The CMA notes suggestions from some respondents that it include further examples of specific factors and evidence that it will take into account in its proportionality assessment and further detail of its approach to weighing these. The relevant factors and evidence will vary depending on the specifics of the CR in question, and the CMA considers the guidance makes this sufficiently clear at paragraph 3.34 where a list of non-exhaustive factors is provided. As such, the CMA does not consider it generally necessary to provide further examples of non-exhaustive factors it may take into account when assessing proportionality. However, in light of the feedback received in the specific context of the Final Offer Mechanism, the CMA has added contractual arrangements as one further such example.
- 4.26 On the sequencing of the proportionality assessment in the process for designing CRs: the CMA has set out that the proportionality assessment will happen after the identification of effective CR options. Whilst, in practice, proportionality may also be considered at an early stage, the CMA considers this sequencing to be appropriate because it focuses the proportionality assessment on a narrower set of tangible, effective options. This will also limit the demands on SMS firms, given the CMA expects the SMS firms and/or other relevant third parties to identify the likely effects of CRs and provide the CMA with evidence as per paragraph 3.36 of the guidance.

Procedure for imposing CRs

Summary of responses

- 4.27 As set out in Chapter 2, many respondents requested that the guidance provide more detail on various processes under the regime and the timings

associated with those processes, including the process for imposing a CR. The CMA does not replicate these points in its response again here but rather summarise additional points specific to the imposition of CRs.

- 4.28 Several respondents commented on the CMA's ability to develop CRs in parallel with SMS investigations and carry out parallel consultations on CRs and the outcome of the SMS investigation. Most respondents were supportive of the CMA's ability to conduct parallel processes, including for the CMA to typically impose CRs as soon as practicable after any designation. Some respondents suggested that the CMA's ability to develop CRs in parallel with an SMS investigation may lead to a risk of pre-judgement and that the CMA should have separate case teams for these processes or start the CR process only after a provisional decision on SMS.
- 4.29 Some respondents raised concerns about the CMA providing firms with the gist of relevant information in a provisional decision to impose CRs, noting their view that such an approach was not compliant with the European Convention on Human Rights and rights of defence within the context of the intrusiveness of CRs and PCIs.

The CMA's views

- 4.30 The CMA has made an amendment to the guidance to reiterate that any development of CRs in parallel with an SMS investigation does not prejudice the outcome of such investigations and will be conducted without prejudice to any SMS findings. With respect to respondents' views on the organisation of the CMA's case teams, the CMA considers it would be inappropriate to provide detail of its operational approach in the guidance. The CMA has extensive experience of managing equivalent investigations under its existing tools⁸ and is confident in its ability to operate such processes effectively without threatening the robustness of its decisions.
- 4.31 In relation to concerns about providing firms with the gist of relevant information, the CMA considers that gist is a well-understood concept in legal terms and involves the communication of the substance of a public authority's case, including evidence on which it seeks to rely. The courts have recognised that in terms of competition investigations, disclosure of the gist is likely to involve a high degree of disclosure and transparency on the part of

⁸ See for example 'Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach', paragraph 3.50. https://assets.publishing.service.gov.uk/media/65cdfc4f130549000c867a9f/A._cma3-markets-supplemental-guidance-updated-june-2017.pdf

the competition authority due to the technical nature of the evidence.⁹ Therefore, the CMA considers that provision of the gist is likely to be appropriate in digital markets investigations, which also possess a high degree of complexity.

Interpretative notes, implementation periods and compliance steps

Summary of responses

- 4.32 Respondents from all quarters expressed support for interpretative notes and the additional clarity they represent, especially for higher-level CRs, with some indicating that the CMA should commit to publish them in all cases. Responses from large digital firms and legal respondents tended to seek more legal certainty. Some requested further guidance on how interpretative notes should be taken into account by SMS firms when implementing CRs, including the weight given to them in conduct investigations. Respondents also suggested that the CMA should consult on initial drafts and updates of interpretative notes.
- 4.33 Some respondents sought more detail or raised points in relation to implementation periods. Some requested that the CMA be flexible, permitting SMS firms sufficient time to implement effective changes while minimising disruption to stakeholders. Others pushed for shorter implementation periods, in particular for simpler CRs or where the SMS firm has already implemented similar remedies in other jurisdictions. A particular concern arising mostly from publishing industry respondents was that the CMA should take steps to prevent circumvention during implementation periods.
- 4.34 A number of industry and other digital firms made suggestions for ways the CMA could hold SMS firms to account for compliance. This included making CR compliance plans and their publication mandatory, reserving the right for the CMA to veto compliance plans, using metrics/KPIs to assess compliance, and for the CMA to explain and oblige SMS firms to demonstrate how their compliance approach is consistent with the requirements of a CR. A consumer organisation also suggested that SMS firms should set out implementation progress in any compliance reporting. A key theme in these responses was to oblige SMS firms to engage with third parties when formulating compliance proposals.

⁹ *BMI Healthcare Limited v CMA* [2013] CAT 24.

- 4.35 In relation to expiry of CRs, some respondents requested clarification on the circumstances in which transitional provisions for expired CRs may be imposed, and limits on their scope/timing.

The CMA's views

- 4.36 In relation to the responses on interpretative notes:

- (a) The CMA notes the widespread support for publishing interpretative notes. The CMA intends to publish interpretative notes where further clarification of the CR may be helpful; as some CRs may be self-explanatory, the CMA does not deem it appropriate to commit to publishing interpretative notes in all cases.
- (b) As to how interpretative notes should be taken into account by SMS firms when implementing CRs, the CMA reiterates that, as set out in paragraphs 3.60 to 3.61 in the guidance, they are intended to provide greater clarity over the CMA's interpretation of a CR, such as by providing examples indicating what compliance might look like. SMS firms will, nonetheless, retain the discretion to take their own approach where they can demonstrate that this is also compliant.
- (c) The guidance already sets out that the CMA will typically publish a draft version of any interpretative notes at the same time as consulting on the proposed CR to which they relate.

- 4.37 The CMA does not think it appropriate to provide any further detail in guidance on implementation periods, and in particular on how long they may be, as this will depend on the circumstances of each case. As noted in paragraph 3.68 of the guidance, the length of the implementation period will depend on a range of factors, including the complexity of the CR and the changes required to the SMS firm's systems. As part of the consultation on proposed CRs, the CMA will welcome the views of affected parties as to the appropriate length of implementation periods. The CMA will guard against risks of circumvention during the implementation period and does not consider it necessary to update the guidance in relation to this point.

- 4.38 The CMA acknowledges stakeholders' interest in inputting into the compliance process. The CMA intends to work constructively with both SMS firms and third parties to ensure transparent implementation, and, as set out in paragraph 3.69 of the guidance, the CMA expects SMS firms to engage with relevant third parties who may be impacted by a CR. The CMA will also require SMS firms to publish a compliance report or summary compliance report (see paragraphs 6.48 to 6.51 of the guidance). That said, it is ultimately

the responsibility of SMS firms to identify an appropriate approach to compliance. The CMA does not see a need for any further changes to the guidance on this point.

- 4.39 The CMA reviewed the responses on the expiry of CRs and has amended the guidance, at paragraph 2.124, to clarify that it will seek to ensure that any transitional, transitory or saving provision made under section 17(1) of the Act will be in place for the minimum time necessary to mitigate the impact of the removal of the obligation on third parties who had relied on it.

Varying and revoking CRs

Summary of responses

- 4.40 Responses relating to the CMA's ability to impose additional CRs or vary them were divided. Some industry respondents supported the regime's flexibility. One respondent recommended initially adopting stricter CRs, which could be moderated later if appropriate. Large digital firms, legal respondents and economic advisory firms, on the other hand, asked that the guidance clarify when the CMA is likely to revisit CRs, and how it will engage with the SMS firm in doing so. They said the guidance should limit the frequency of variations or new CRs, noting the importance of regulatory certainty, noting in particular the burden on SMS firms and impacts on consumers.
- 4.41 A small number of respondents asked to clarify the difference between and circumstances in which the supplementing process outlined at paragraph 3.30 of the draft guidance will be used as opposed to the process to vary a CR and/or update interpretative notes.

The CMA's views

- 4.42 The CMA's approach to varying CRs will depend on the circumstances of each case, so it would not be appropriate to prescribe a general approach in guidance. As to the requests for a more structured approach to varying CRs, paragraph 3.85 of the guidance notes that the approach for varying CRs reflects that for imposing CRs, including considering the steps in paragraphs 3.19 to 3.36. The process for varying CRs is further explained in paragraphs 3.92 to 3.97, including provision for notice and consultation with the SMS firm and affected stakeholders. As noted in paragraph 3.88, the CMA understands the importance of regulatory certainty, and will take this into account in both designing and varying CRs.
- 4.43 The CMA acknowledges the ambiguity of the word 'supplemented' in relation to CRs, at paragraph 3.30 of the guidance. The CMA has amended the

guidance to clarify that the word refers to both imposing additional CRs, and/or varying existing CRs in accordance with paragraphs 3.19 to 3.36, rather than a different approach.

5. Pro-competition interventions

- 5.1 More than half of respondents commented on the draft guidance on PCIs. Respondents were a mix of large digital firms, legal respondents, other digital firms, trade bodies and consumer organisations. Comments ranged from high-level support for the CMA's approach to PCIs, to specific calls for more detail on points such as the processes around PCI investigations.

Assessing whether there is an Adverse Effect on Competition

Summary of responses

- 5.2 Many respondents sought greater clarity on the CMA's approach to assessing whether there is an adverse effect on competition ('AEC'). Comments focused on the following themes:
- (a) The extent to which the AEC test in the digital markets competition regime is similar to the AEC assessment undertaken in the CMA's markets tool.
 - (b) Requests for clarification on certain elements of the assessment framework in the draft guidance, such as how the CMA will consider efficiencies and possible unintended consequences.
 - (c) Suggestions of factors the CMA should consider in its AEC assessment, ranging from the role of innovation and the limitations of rivals through to past infringements by a firm and long lag periods between a development and a firms' response to it.
 - (d) Three respondents requested more information on the types of evidence the CMA will use to inform the assessment (including as to the relative weight given to qualitative and quantitative evidence), although another respondent said the CMA should not have a prescriptive list.
- 5.3 Three respondents commented on the role of market definition in PCI investigations: one respondent suggested that a market definition exercise could be helpful to the CMA when conducting PCI investigations; whereas two other respondents stated that a market definition should not be required.

The CMA's views

- 5.4 Paragraph 4.3 of the guidance clarifies the relationship between the legal tests and procedures which apply when the CMA is considering whether to make a PCI and those which apply when it is considering whether to make an intervention under the market investigation regime. In particular, it notes that

the concept of an AEC is present in both regimes, and as such there will be similarities in approach even if the two tests have a different statutory basis. The CMA has also amended the guidance in order to respond to requests for greater clarity on the CMA's approach to the AEC assessment and how closely this will follow the approach in the markets regime. This includes detailing how the CMA will apply elements of the 'well-functioning market' concept used in that regime in the context of PCI investigations.

- 5.5 The guidance has also been updated to provide further clarity on how the CMA will consider efficiencies. The CMA notes that some respondents raised concerns regarding the importance of not allowing false or overstated efficiency claims, or efficiencies that could be achieved by other means, to prevent an AEC finding. While the CMA agrees with those concerns, it considers that the tests set out in paragraph 4.13 of the guidance are sufficient to address these.
- 5.6 Beyond these revisions, the CMA does not consider it appropriate to provide further detail in the guidance on the matters it will take into account in the AEC assessment. As set out at paragraph 4.8 of the guidance, the CMA has the flexibility to investigate a wide range of possible factors relating to the relevant digital activity, each of which may affect different aspects of competition. As such, the CMA considers that it is important to maintain flexibility in the guidance so it can tailor its approach to the circumstances of an individual PCI investigation.
- 5.7 Similarly, the CMA also does not consider that it would be appropriate to elaborate further in the guidance on the kinds of evidence it will consider in PCI investigations, as this will be highly case-specific. Instead, the CMA will seek to gather the most informative evidence for the investigation at hand rather than following a prescriptive list. The CMA does not agree with the suggestion made by some respondents that quantitative evidence should take precedence over qualitative evidence, as both are informative and individual pieces of evidence should be evaluated on their quality and relevance rather than form.
- 5.8 Finally, as discussed above in relation to the assessment of market power in SMS investigations, the CMA considers that formal market definition can add unnecessary complexity due to its focus on drawing arbitrary bright lines about what is 'in' and 'out' of the market and is particularly ill-suited to digital markets. As such, the CMA does not consider that adopting a formal market definition exercise as part of its PCI investigations would assist in its assessment.

Scope of a PCI

Summary of responses

- 5.9 The CMA received a range of views on aspects of the guidance concerning when a PCI could apply outside of the relevant digital activity. One digital firm specifically highlighted the need for PCIs to apply to non-designated activities, in particular to address the risk of firms moving harmful conduct to avoid regulation. Other respondents opposed the imposition of PCIs outside a firms' designated activity or considered the approach inconsistent with the Act.
- 5.10 Some respondents asked for more clarity and examples of when a PCI may be imposed outside the relevant digital activity including the degree of connection required and what safeguards will be in place.

The CMA's views

- 5.11 Both the Act and Explanatory Notes make clear that a PCI can be imposed outside of the relevant digital activity to address an AEC identified in relation to the relevant digital activity.¹⁰ This is reflected in paragraphs 4.15 to 4.17 of the guidance, which also explains that the factors giving rise to an AEC may be within the relevant digital activity, or outside of it, provided they are connected to such digital activity. Similarly, the AEC can concern competition in relation to the relevant digital activity itself, or it may concern competition in relation to another activity, provided the effect is connected to the relevant digital activity.¹¹
- 5.12 The guidance also notes the limits on the power to impose PCIs outside of the relevant digital activity. Paragraph 4.17 explains that factors that are unrelated to a relevant digital activity, and competition concerns arising from the conduct of an SMS firm that are unrelated to the relevant digital activity, are not appropriate for consideration through a PCI investigation.
- 5.13 As set out in the guidance, the CMA's approach to imposing PCIs outside of a designated activity, and the factors that it will take into account when deciding whether to do so, will generally be case specific. This recognises, in

¹⁰ Paragraph 273 of the Explanatory Notes set out that the CMA can implement a PCI in relation to any part of the designated firm's business, where such a PCI would address the competition problem. This point is also reflected in the wording of section 46(3), which notes that a PCI can take the form of a PCO imposing requirements as to how the designated firm must conduct itself in relation to the designated activity 'or otherwise'. Similarly, recommendations can be made to any person exercising functions of a public nature about steps which the CMA considers the person ought to take in respect of the designated firm, the designated activity 'or otherwise'.

¹¹ This is also reflected in the Explanatory Notes to the Act. See paragraph 276.

particular, that the connection between a relevant digital activity and non-designated activity could take a variety of different forms. As such, the CMA does not consider it necessary or appropriate to provide further examples or guidance on this issue at this stage. Instead, its case practice should provide such examples in due course.

Identifying an appropriate PCI

Summary of responses

5.14 The feedback received on the CMA's approach to identifying an appropriate PCI covered three main areas:

- (a) A few respondents commented on the proportionality assessment framework for PCIs. Specifically, one stakeholder asked for existing proportionality case law to be added to the guidance, and another said that proportionality should be considered throughout the PCI process, instead of as a last step.
- (b) A few respondents set out types of PCIs the CMA should consider, such as eliminating contractual terms that are harmful to competition. Other respondents asked the CMA to clarify that it would only impose structural remedies in exceptional and limited circumstances.
- (c) A few respondents asked what evidence SMS firms can put forward to demonstrate consumer benefits when imposing PCIs. This was also raised in respect of CRs and is discussed in Chapter 4 of this document. The CMA does not replicate its consideration of these points again here.

The CMA's views

5.15 In relation to the comments on proportionality:

- (a) In developing the proportionality framework in the guidance, the CMA has drawn on learnings from other CMA tools and existing case law. As a result, the CMA believes the framework to be comprehensive and does not consider explicit reference to existing case law to be necessary.
- (b) As per the steps set out in paragraph 4.19 of the guidance, the CMA has set out for the proportionality assessment to happen after the identification of effective PCI options. Whilst in practice there may be some overlaps between those steps, the CMA considers this sequence is the most appropriate approach, in particular because it focuses the proportionality assessment on those options which would be effective in achieving the

purpose of the PCI. This will also limit the demands on SMS firms, given the CMA's intention to encourage SMS firms to engage on potential PCI options.

- 5.16 The CMA considers that the examples of specific types of PCIs that the CMA might impose raised by respondents are broadly encompassed within the categories of non-exhaustive remedy options set out at paragraph 4.23 in the guidance and therefore it is not necessary to include further examples. For instance, eliminating contractual terms that are harmful to competition could be an example of a general restriction on conduct as per paragraph 4.23(a). The CMA does not consider it appropriate to amend the guidance to indicate that structural remedies would be applied in exceptional and limited circumstances only. Such a limitation is not imposed in the Act, and the question of whether structural remedies will be appropriate will depend on the specifics of the relevant case. Nevertheless, the CMA will have regard to the impact of structural separation remedies when deciding whether to impose them, including as part of the proportionality assessment.

PCI procedure

The PCI investigation procedure

Summary of responses

- 5.17 A few respondents sought greater clarity on the evidence that the CMA would consider as part of its decision to launch a PCI investigation. For example, one legal respondent asked for more information on the CMA's approach to using evidence from its previous work; and a consumer organisation said complaints should be part of the evidence that the CMA might consider in deciding to open a PCI investigation.
- 5.18 As set out in Chapter 2 of this document, many respondents requested that the guidance provide more detail on various processes under the regime and the timings associated with those processes, including the process for PCI investigations. The CMA does not replicate these points and its response again here. In addition to this, some respondents asked about the sequencing of PCI investigations relative to SMS investigations and/or CR procedures and whether these may overlap. Some respondents said clarity is needed on how the CMA will avoid prejudice in its PCI investigations and remedies considerations.
- 5.19 Some respondents sought more information on how the CMA would engage with SMS firms and third parties throughout the PCI investigation process,

including ahead of the decision to launch an investigation; in the process of imposing, reviewing and replacing pro-competition orders ('PCOs') and on potential commitments.

- 5.20 Some respondents raised concerns about the CMA providing firms with the gist of relevant information in a provisional decision to impose PCIs, noting that such an approach was not compliant with ECHR rights and rights of defence within the context of the intrusiveness of CRs and PCIs.

The CMA's views

- 5.21 As set out in paragraph 4.44 of the guidance, the CMA does not have a prescriptive list of evidence that it will take into account when deciding whether the threshold is met for opening a PCI investigation. This is because the evidence which could be relevant may vary considerably from case to case. As such, the guidance seeks to provide a non-exhaustive list of the types of evidence that the CMA might consider, while preserving the flexibility to consider the most appropriate evidence in each case. The CMA has made two amendments to the guidance to reflect the specific comments received:
- (a) Amendments at paragraph 4.44(c) clarify that the CMA will be mindful of when and for what purpose the evidence was initially gathered. The CMA will consider the weight it should be given, as well as the extent to which it should be updated or corroborated, in particular given market developments since the evidence was gathered.
 - (b) The CMA intended for the reference to 'third parties' in paragraph 4.44(e) to encompass complaints, but it has amended the guidance to make this clearer.
- 5.22 The CMA has amended the guidance to add a table setting out the key stages of engagement that the CMA expects typically to take place during a PCI investigation process between the CMA and stakeholders, including SMS firms and third parties. The table is intended to aid stakeholders' understanding of how the CMA will typically engage them in its processes. It should be read alongside the detailed guidance which sets out the full procedure that the CMA will follow. The CMA has also updated the guidance to commit to publishing a case-specific administrative timetable on its website at the outset of an investigation. This timetable will be regularly reviewed and updated as necessary during the investigation to ensure the SMS firm and interested stakeholders are kept updated on the status of the case.

- 5.23 In relation to the sequencing of PCI investigations relative to SMS investigations and CR-setting processes, the CMA does not consider it is necessary to further update the guidance on these points:
- (a) The legislation provides that the CMA cannot launch a PCI investigation before an SMS investigation has concluded and an SMS firm has been designated.
 - (b) The sequencing of CR-setting processes and PCI investigations will depend on the circumstances of each case. Indeed, as noted in paragraphs 4.11 to 4.13 above, the decision as to whether the CMA will use a CR and/or a PCI to address an issue will need to be taken on a case-by-case basis, and it is possible that in appropriate circumstances the CMA could use CRs and PCIs in parallel to target different aspects of an issue.
- 5.24 Regarding respondent's concerns of prejudice, the CMA sets out in the guidance that remedies discussions will be held without prejudice to any AEC finding. The CMA has extensive experience of managing equivalent investigations under its existing tools¹² and is confident in its ability to operate such processes effectively without threatening the robustness of its decisions.
- 5.25 In relation to concerns about providing firms with the gist of relevant information, the CMA considers that gist is a well-understood concept in legal terms and involves the communication of the substance of a public authority's case, including evidence on which it seeks to rely on. The courts have recognised that in terms of competition investigations disclosure of the gist is likely to involve a high degree of disclosure and transparency on the part of competition authority due to the technical nature of the evidence.¹³ The CMA therefore considers that provision of the gist is likely to be appropriate in digital markets investigations, which also possess a high degree of complexity.

Testing and trialling PCOs

Summary of responses

- 5.26 The CMA received mixed feedback on the sections of the draft guidance concerning the approach to testing and trialling of PCOs. Several other digital

¹² See for example 'Market Studies and Market Investigations: Supplemental Guidance on the CMA's Approach', paragraph 3.50. https://assets.service.gov.uk/media/65cdfc4f130549000c867a9f/A._cma3-markets-supplemental-guidance-updated-june-2017.pdf

¹³ *BMI Healthcare Limited v CMA* [2013] CAT 24.

firms said that imposing requirements for an SMS firm to test and trial different remedies is vital to ensuring effective remedies.

- 5.27 Conversely, other respondents, in particular large digital firms and legal respondents, raised concerns about the testing and trialling of PCOs, in particular asking for further clarity on how proportionality will be applied to testing and trialling. One large digital firm said the CMA must take account of the time and resource that an SMS firm will need to engage in order to conduct the trial, as well as the impact on any third parties dependant on digital activities and end users.

The CMA's views

- 5.28 In paragraph 4.71 of the guidance, the CMA explains that it will consider three overarching factors when deciding whether to impose requirements on a trial basis, namely the expected value of the proposed test or trial, its feasibility and its proportionality. The CMA considers that the points raised by respondents in paragraph 5.26 above are already captured via these three overarching factors. For example, the time and resource implications for SMS firms, along with the impact of any testing and trialling on users and third parties, would be considered under the 'proportionality' and 'feasibility' factors. The CMA therefore considers the guidance at paragraph 4.71 sufficient to address those comments and no further amendments are necessary.
- 5.29 More generally, paragraph 4.71 (c) of the guidance also notes that the CMA will consider how to ensure a proportionate approach to the exercise of its testing and trialling power, in line with general principles of public law.

Commitments

Summary of responses

- 5.30 The CMA received a range of feedback on the sections of the draft guidance concerning commitments. Several respondents asked for more clarity on when the CMA would consider accepting commitments, with some suggesting the CMA considers these at all stages of PCI investigations. A publishing industry respondent said the guidance should express a preference for imposing PCOs rather than accepting commitments.

The CMA's views

- 5.31 In relation to the comments on the timing of commitments, the CMA considers this has already been sufficiently clarified in the guidance. As set out in paragraph 4.95, while it will be open to an SMS firm to offer a commitment to

the CMA either prior to, or at any stage of a PCI investigation, the appropriate timing of any commitment discussions will be determined on a case-by-case basis in light of the specific facts in each case. Paragraph 4.96 also explains that the CMA expects that in most cases, it will not accept a commitment offered at a late stage of an investigation. However, it recognises that there may be isolated cases, where the specific facts of the case justify the CMA diverging from this expectation, hence why the wording refers to the position that it will adopt in most cases.

- 5.32 The CMA does not consider it would be appropriate to amend the guidance to express a preference for imposing PCOs rather than accepting commitments. The CMA has no such preference – instead, its key focus will be on the most appropriate way to remedy, mitigate or prevent an AEC.

6. Investigatory powers

- 6.1 Almost half the respondents to the consultation provided views on the investigatory powers chapter of the draft guidance. Comments included high-level support for the CMA's approach to the use of its investigatory powers. A few respondents raised concerns about the far-reaching information gathering powers conferred on the CMA.

Investigatory powers

Power to require information

Summary of responses

- 6.2 A few respondents highlighted the burden that requests for information can place on the organisation receiving them. For example, one digital firm stated that it is important that information requests are not disproportionate or unduly burdensome, and that realistic deadlines for responses are set.
- 6.3 A similar number of respondents asked for the guidance to state that the CMA would share information requests in draft as standard to allow for input and engagement before they are finalised.

The CMA's views

- 6.4 As set out in paragraph 5.17 of the guidance, the CMA recognises that information requests will have an impact on recipients, particularly smaller firms or consumer organisations. Therefore, when formulating an information notice, the CMA will strive to avoid imposing unnecessary burden on such persons while also considering the need for the CMA to operate efficiently and effectively. Similarly, paragraph 9.35 of the guidance notes that the CMA will be fair and reasonable in its requests for information and when setting deadlines for parties to respond.
- 6.5 Paragraph 5.18 of the guidance explains that in appropriate cases, the CMA will seek to give recipients of information requests advance notice so that they can manage their resources appropriately. In certain circumstances where it is practicable and appropriate to do so, the CMA may also send an information notice in draft for discussion with the party. Given that the CMA must conclude particular functions under the digital markets competition regime within statutory deadlines, the CMA does not consider it would be appropriate to commit to sharing draft requests for information by default. However as stated in paragraph 6.10 below, it will make a firm commitment to do so where

the CMA requests a firm to vary its conduct or perform a demonstration or test as part of an information request.

Varying conduct or performing a demonstration or test

Summary of responses

- 6.6 Respondents had mixed views on the CMA's approach to the powers to require a person to vary conduct or perform a demonstration or test. Some respondents noted their support for these powers, with one suggesting the guidance provide additional examples to illustrate the broad nature of how the power can be applied.
- 6.7 Other respondents highlighted potential burdens and unintended consequences of these powers. They said that the factors set out in the draft guidance – value, feasibility and proportionality — should be more explicit in the CMA's decision making and in setting the scope of the request.
- 6.8 Several respondents suggested further additions to the guidance around how the CMA would exercise this power in practice:
- (a) A few suggested that in deciding to use this power the CMA should consider further aspects, including whether the firm has already carried out similar testing itself and whether the test is possible in light of other regulatory obligations.
 - (b) Others suggested that the CMA should impose specific limits on the use of the power, including that it should only be used in respect of designated firms and activities; where it is relevant to compliance reporting; as a last resort once other information gathering powers have proven insufficient; and for limited time periods.
 - (c) Several respondents said there should be meaningful engagement with firms before the power is used.

The CMA's views

- 6.9 The CMA has made a change to the guidance to strengthen its commitment to take account of the three factors – value, feasibility and proportionality – when considering whether to require a firm to vary its conduct or perform a demonstration or test for information gathering purposes. Accordingly, in paragraph 5.14, the guidance has been amended from 'the CMA is likely to consider' to 'the CMA will consider' these factors when considering using this investigatory tool. The CMA considers that the additional factors referred to in

paragraph 6.8(a) above are already captured by these three overarching principles and therefore it is not necessary to add these into the guidance.

- 6.10 To further reflect feedback, the CMA has also amended the guidance to expressly set out in paragraph 5.15 that where the information notice includes a requirement to test, trial or conduct a demonstration under section 69(5) of the Act, the CMA will share any such notice in advance and engage with the recipient on the scope of the request.
- 6.11 The CMA does not consider it would be appropriate to amend the guidance to place additional limits on the use of this power along the lines set out in paragraph 6.8(b) above, since these limitations are not contained in the Act.

Requirement to name a senior manager

Summary of responses

- 6.12 Two respondents said that paragraph 5.27 of the draft guidance unduly limits who can be a senior manager, with one suggesting a firm should be given flexibility to appoint an appropriate person based on the SMS firm's specific organisational structure.

The CMA's views

- 6.13 The description of a senior manager in the guidance is intended to indicate the level of seniority that the CMA would expect an individual appointed to this position to hold. However, the description is intended to be an example, and the CMA recognises that firms may seek to appoint an individual who occupies a different position. The guidance reflects this and has been amended to state that it is the responsibility of the firm to appoint an individual with the necessary expertise, oversight and responsibility for the issue which is the subject matter of the particular information notice.

Power of access

Summary of responses

- 6.14 A few respondents commented on how the CMA may exercise its power of access under section 71 of the Act. One respondent welcomed the CMA's ability to observe a demonstration or test. Other respondents called for more limits to be placed on the exercise of this power including for the CMA to engage with a firm first and to consider the necessity and proportionality of using the power.

The CMA's views

- 6.15 The guidance explains the CMA's power of access as set out under section 71 of the Act. The Act sets out specific circumstances in which this power can be exercised, the purposes for which it can be used, along with the notice requirements for exercising this power. The CMA does not consider it appropriate to set any additional limits around the use of this power which were not provided for in the Act.

Power to interview

Summary of responses

- 6.16 A few respondents – in particular legal respondents, large digital firms and a trade body — sought more information on the CMA's approach to interviews. They commented on paragraph 5.43 of the guidance where the CMA set out that, while it recognises that the interview power may be used in a range of circumstances, the CMA's starting point is that it will generally be inappropriate for a legal adviser only acting for the undertaking to be present at an interview. They queried whether taking this approach, which is similar to that laid out in the *Guidance on the CMA's investigation procedures in Competition Act 1998 cases ('CMA8')*, would be appropriate, particularly in cases where there is no alleged wrongdoing on the part of the firm or an employee. They pointed to differences between the two regimes which they considered would justify taking a different approach.
- 6.17 Other comments included one respondent seeking more detail on fundamental rights issues, such as in relation to self-incrimination and a publishing industry respondent asked about the CMA's approach to interviewing persons that fall outside the scope of section 72 of the Act, including whether the CMA would ask them to attend a voluntary interview.

The CMA's views

- 6.18 In relation to the comments concerning paragraph 5.43 of the guidance on exclusion of legal advisers acting only for a firm, the guidance noted that this would be the CMA's starting position, not a blanket policy. However, in response to these concerns, the CMA has updated the guidance to clarify that fact and note explicitly that the CMA will undertake a case-specific assessment and give consideration to requests from a firm that its advisers be present.
- 6.19 In relation to the comments summarised in paragraph 6.17 above:

- (a) The CMA has added a section addressing privilege against self-incrimination in the guidance at paragraphs 5.91 and 5.92.
- (b) The CMA has updated the guidance to state that it may, in appropriate cases, ask persons to attend a voluntary interview where they fall outside the scope of the power to interview in section 72 of the Act.

Power to enter business premises without a warrant/with warrant

Summary of responses

- 6.20 Two respondents sought more information and examples on when the CMA would enter business premises with or without a warrant respectively.
- 6.21 A legal respondent suggested several clarifications to the guidance on the power to enter premises under a warrant, namely: (a) that force would only be used where entry is prevented and would not be used against a person (in line with the approach in CMA8); (b) the references to the CMA's power to require the production of information when accessing the premises with a warrant should be limited to information of the relevant kind; and (c) provisions should be included to ensure that non-CMA employees are bound by the same confidentiality duties as employees.

The CMA's views

- 6.22 In relation to the request for more information and examples on when the CMA would exercise its powers to enter premises with or without a warrant, the draft guidance already summarises the relevant provisions of the Act which explain when those powers can be exercised. For example, it notes that the power to enter premises without a warrant under section 74 of the Act is only available in relation to business premises; and in order for the CMA to obtain a warrant to exercise its powers under section 75, the court or the Competition Appeal Tribunal ('**CAT**') must be satisfied the conditions for granting a warrant are satisfied.
- 6.23 Paragraph 5.54 of the guidance also provides an indication of when the CMA would usually seek a warrant to search premises – namely where the CMA suspects that the information relevant to an investigation may be destroyed or otherwise interfered with if the CMA requested the material via a written request.
- 6.24 Beyond this, it is important that the CMA has the flexibility to choose the most appropriate investigative tool depending on the circumstances of the case. As such, it does not consider it necessary or appropriate to amend the draft

guidance to provide further information on when it would exercise each of those powers.

6.25 In relation to the comments summarised in paragraph 6.21 above:

- (a) While the CMA is permitted to use such force as is reasonably necessary to enter premises, the CMA has amended paragraph 5.60 of the guidance by adding a footnote to clarify that it would not use force unless entry had been previously attempted and was either prevented or otherwise not possible, nor would it use force against a person.
- (b) The CMA does not agree that the guidance should state that the CMA's power to require the production of information is limited to information of the relevant kind when accessing a premises with a warrant. It considers that paragraphs 5.62(b) and 5.62(d) of the guidance accurately reflect the powers in sections 75(2)(d) and 75(2)(f) of the Act respectively, which are not limited to information of the relevant kind. Where the powers conferred on the CMA in section 75(2) do make reference to information of the relevant kind, the CMA has reflected this in the guidance.
- (c) The CMA has amended paragraph 5.61 of the draft guidance by adding a footnote to confirm that non-CMA employees who are authorised to accompany and assist CMA officers will be bound by the same confidentiality duties as CMA employees carrying out the same inspections.

Reports by skilled persons

Summary of responses

6.26 Several respondents discussed reports by skilled persons. Their comments covered a range of different themes around seeking more information on how such reports will work in practice, including:

- (a) The circumstances in which a report by a skilled person would be used, as well as benchmarks and best practices for reports.
- (b) How different stakeholders will be engaged throughout the process, and whether the SMS firm and third parties would have access to the skilled persons report.
- (c) More detail on the process for how skilled persons would be identified, assessed and appointed. In particular one respondent asked whether the CMA will develop a panel of skilled persons or a pre-approved list.

The CMA's views

- 6.27 The CMA's view is that the question of whether it is appropriate to appoint a skilled person, the type of skilled person who should be appointed and the material that a report should cover will need to be assessed on a case-specific basis. As such, the CMA does not consider it would be appropriate to provide further material in the guidance beyond that set out currently. It should also be noted that further information on the specific requirements for a given skilled person report will be set out in the notice requiring a firm to make an appointment.
- 6.28 The CMA will engage with a firm that has been given notice requiring it to make the appointment of a skilled person on the identification of the skilled person and the terms on which they are appointed, including in relation to their remuneration and expenses. In response to the feedback asking whether an SMS firm and third parties would be given access to a skilled persons report, the CMA has made the following changes to the guidance:
- (a) Paragraph 5.75 states that the firm which is the subject of the skilled person report will generally be given access to the final report (subject to any necessary confidentiality redactions) and the opportunity to provide its views thereon.
 - (b) Paragraph 5.76 clarifies that typically a skilled persons report will not be made publicly available to ensure full and open dialogue between the relevant parties. However, the CMA will consider on a case-by-case basis whether it would be appropriate to seek input from third parties (for example on particular issues as part of the process of producing the report) and/or to provide them with updates (such as by providing a summary of the key themes covered by the report).
- 6.29 Regarding the comments on the process for how skilled persons would be identified, assessed and appointed:
- (a) The CMA considers that the process is adequately outlined in the guidance. As set out at paragraph 5.73, where the CMA gives notice to the firm requiring it to make the appointment of the skilled person, the notice will set out the relevant matters to be included in the report and that the firm may not make the appointment until the CMA has approved in writing the terms on which the skilled person will be appointed including their remuneration and expenses. Recognising that there may be different kinds of circumstances in which a skilled person may be appointed, and as this is a new tool, the CMA has removed reference to a 'usual approach.'

- (b) The CMA does not propose to establish a pre-approved panel of skilled persons ahead of the commencement of the regime, although a panel system may be developed as the regime evolves.

Duty to preserve information

Summary of responses

- 6.30 Several respondents asked for the guidance to provide more information on when a firm becomes subject to the duty to preserve information, and one respondent suggested that the CMA should be required to inform parties when it considers that the duty takes effect. Respondents also raised concerns about the scope of the persons covered by the duty, with one legal respondent suggesting that it should be limited to persons with sufficient proximity to compliance functions in relation to the Act.
- 6.31 Two respondents also sought more guidance on the scope of documents caught by the duty.

The CMA's views

- 6.32 The CMA understands respondents' desire for additional clarity around when the duty to preserve information may arise, along with the persons and documents covered by that duty. It has already sought to provide guidance on these areas where practicable. In particular:
- (a) Paragraphs 5.85 to 5.87 of the guidance seek to elaborate on when it might consider a person has 'knowledge' or 'suspicion' of the circumstances set out in sections 80(2) to (5) of the Act, such that the duty would arise.
- (b) Paragraph 5.81 of the guidance notes that the legislation circumscribes the persons who may be subject to the duty to those persons who have knowledge and/or suspicion (as the case may be) of the circumstances in sections 80(2) to (5), and so the scope of persons subject to the duty is not unrestricted.
- (c) Paragraph 5.87 of the guidance notes that 'a person should take a broad view' of the concept of 'relevant information' in section 80 of the Act. Nevertheless, in response to the feedback received, the CMA has added some wording at paragraph 5.87 to give an indicative example of what it may consider to be 'relevant information' in the context of a breach investigation.

6.33 However, the questions of when the duty arises, and the persons and documents covered by it, are highly case specific and the CMA has reiterated this at paragraph 5.85 with respect to whether a person knows that the duty arises. Given that fact-specificity, the CMA considers that it would not be appropriate to amend the guidance to provide further information on these issues (beyond the addition noted in paragraph 6.32(c) above). In addition, a number of the suggestions made by respondents for changes to the guidance (such as the proposal that the duty should be limited to persons with sufficient proximity to compliance functions related to the Act) would involve inappropriately circumscribing the duty beyond the limits already set out in the Act.

Information handling

Information sharing within the CMA

Summary of responses

6.34 Three respondents commented on paragraph 5.93 of the guidance. Two of them expressed concern about the possibility of evidence obtained via one of the CMA's other functions being shared and used for the purposes of exercising the CMA's digital markets functions, suggesting that this was inconsistent with the CMA's past practice. Another respondent advocated for the opportunity to make representations prior to transfer.

The CMA's views

6.35 The CMA considers that it is in the public interest that information lawfully obtained by the CMA should be available across its statutory functions. This makes the exercise of its functions more efficient and decreases the burden on market participants who might otherwise have to provide the same information to the CMA on multiple occasions.

6.36 The position in paragraph 5.93 of the guidance is consistent with existing CMA policy and mirrors the approach in the *CMA's Statement on Transparency and Disclosure* ('**CMA6**'). As such, the CMA does not intend to change that position. However, it has made some amendments to paragraph 5.93 to clarify this and further align the respective wording across the two guidance documents. It has also amended this paragraph to provide further information on its approach to using information obtained via its other functions. In particular, these amendments note that the CMA will be mindful of when and for what purpose the evidence was initially gathered, and where it proposes to rely on such evidence it may ask firms and other relevant third

parties to provide views on the continuing relevance of evidence, as appropriate.¹⁴ As before, specific guidance regarding the CMA's obligations and approach where it proposes to disclose information to external parties, is then set out at paragraphs 5.95.

Protecting confidential information

Summary of responses

- 6.37 Almost a fifth of respondents to the consultation commented on the protection of confidential information. Digital firms and publishing industry respondents in particular sought reassurances around their anonymity and the confidentiality of information they disclose to the CMA due to fears of commercial retaliation.
- 6.38 Other respondents sought more detail on how the CMA will approach and engage with firms on confidentiality and safeguard confidential information. For example, several respondents said the guidance should clarify the process for firms to make confidentiality claims prior to disclosure, and more strongly commit to seeking these out from firms. Another suggested that the guidance was not aligned with other regimes.
- 6.39 One respondent specifically asked whether the CMA would make use of data rooms as one potential mechanism for disclosure during the operation of the regime. Finally, another respondent commented on the extent to which the CMA can disclose confidential information to overseas regulators.

The CMA's views

- 6.40 The CMA is cognisant of stakeholder concerns around the protection of confidential information and the risk of commercial retaliation. Paragraph 5.94 of the draft guidance acknowledges that the CMA's approach to how it protects and handles confidential information will be an important consideration for those who might engage with the digital markets competition regime. The CMA has set out its approach to protecting confidential information throughout the guidance, including in paragraphs 5.94 to 5.99 and 6.14 to 6.18. As noted in those paragraphs, the CMA is under statutory obligations to protect the confidentiality of information relating to individuals and businesses where that information comes to it in connection with the exercise of its statutory functions. Statutory protections are also in place to protect whistleblowers as described at paragraph 6.20.

¹⁴ Similar amendments have been made to the SMS and PCI chapter as is noted in paragraphs 3.31 and 5.20.

- 6.41 However, the CMA is unable to offer absolute guarantees around the protection of confidential information, as in some circumstances the CMA may be legally required to disclose that information, for example if the information is subject to court-ordered disclosure, or if disclosure is necessary to satisfy the rights of a party under investigation. As noted in paragraph 5.99 of the guidance, if the CMA considers that it is required by law to disclose confidential information it would consider the most appropriate mechanism for such disclosure. For example, the CMA may consider the use of a confidentiality ring and would engage with parties in advance prior to disclosing information in this way.
- 6.42 The CMA does not consider it appropriate to amend the guidance to provide further information on how the CMA will approach and engage with firms on confidentiality (including in respect of confidentiality representations prior to disclosure of information). The approach set out in paragraphs 5.97 to 5.98 of the guidance is aligned with, and cross-refers to, CMA6. It is therefore consistent with the approach that the CMA takes in other regimes and takes account of the CMA's established processes for the handling of confidential information.
- 6.43 With regards to the use of data rooms in the regime the CMA has amended paragraph 5.99 of the draft guidance to reflect the availability of data rooms as a tool for disclosure.¹⁵ The CMA notes, however, that the use of data rooms is rare in practice.
- 6.44 Finally, with regard to the request for further detail on disclosure of information to overseas authorities, while the CMA may freely share general information about its work and experiences with overseas public authorities,¹⁶ or through international fora, the disclosure of specified information¹⁷ is only permissible if an information gateway is available under Part 9 of the Enterprise Act 2002 ('EA02'). Further information on these gateways and the CMA's approach to disclosure to overseas public authorities is contained in CMA6.

¹⁵ The guidance also refers to the potential use of data rooms at paragraph 7.31.

¹⁶ An 'overseas public authority' has the meaning given to it under section 246A of the EA02 – it is any person or body in any country or territory outside the UK which appears to exercise functions of a public nature in relation to certain functions specified under (i) to (v) of section 243A(1)(b), namely the investigation and bringing of criminal proceedings, the investigation and bringing of civil proceedings in connection with the enforcement of specified legislation, or deciding whether to start or bring to an end such proceedings.

¹⁷ 'Specified information' has the meaning given to it in section 238 EA02. This includes, but is not limited to, information gathered by the CMA in connection with its exercise of its digital markets functions.

7. Monitoring

- 7.1 Around half of respondents to the consultation commented on the draft guidance on monitoring. Respondents were a mix of stakeholders including large digital firms, other digital firms, legal respondents, publishing industry respondents, and trade bodies. Comments included high-level support for the CMA's approach to monitoring, though some respondents sought further detail and greater clarity on how some aspects of monitoring would work in practice.

Evidence gathering

Summary of responses

- 7.2 A few respondents welcomed the opportunities set out in the draft guidance for third parties to contribute information to the CMA to support its monitoring work. One large digital firm sought additional clarity on the types of information the CMA would likely rely on most for its monitoring activities.
- 7.3 Respondents encouraged the CMA to be mindful of any resource implications of its monitoring work on SMS firms and third parties, including in relation to evidence gathering.
- 7.4 Many respondents provided feedback in relation to complaints:
- (a) A large number of different respondents highlighted the importance of confidentiality when making complaints to the CMA. Some respondents sought greater assurance that the CMA would protect complainants' identities and information provided, and some asked for greater clarity about when information provided by a complainant to the CMA would be shared with the relevant SMS firm.
 - (b) Two large digital firms suggested that the CMA should provide to an SMS firm, non-confidential versions of complaints or submissions that third parties make to the CMA pertaining to them, explaining that this would allow SMS firms to correct any factual inaccuracies and provide additional relevant information.
 - (c) Several respondents sought greater clarity on the CMA's procedures for handling complaints, including how complaints will be prioritised through to investigation. A large digital firm suggested that the CMA should consider as a prioritisation factor, whether the complainant had first sought to address the issue with the SMS firm directly.

- (d) Two respondents asked for greater clarity on the type of information that the CMA would expect to see in a complaint and suggested the CMA provide a template form to support third parties in submitting complaints.

The CMA's views

- 7.5 A non-exhaustive list of information sources the CMA may draw on as part of its monitoring activities is included in the guidance in paragraph 6.9. The CMA expects its monitoring activities, including how it will rely on the different sources listed, will vary depending on the nature of the competition requirement and whether the CMA is monitoring for the purposes of assessing compliance, effectiveness, or whether to impose, vary or revoke competition requirements. The CMA will seek to conduct its monitoring work efficiently, with regard to any resource implications it may place on SMS firms and third parties.
- 7.6 The CMA understands the importance of confidentiality to organisations and individuals when making complaints. The CMA's approach to protecting confidential information is set out at paragraphs 5.94 to 5.100 of the guidance. The CMA considers that this already sets out robust steps to protect complainants. These steps are underpinned by the CMA's statutory obligations to protect the confidentiality of information relating to individuals and businesses where that information comes to it in connection with the exercise of its statutory functions.
- 7.7 In relation to some respondents' requests that the CMA share non-confidential versions of complaints with SMS firms, given the concerns raised in relation to confidentiality, the CMA will not generally share individual complaints with SMS firms and instead provide aggregated or thematic feedback. If, on occasion, the CMA does consider it necessary to share an individual complaint with an SMS firm, for example to enable the SMS firm to take action to resolve those concerns, the CMA may do so on an anonymised basis and will engage with the complainant(s) prior to doing so, to clarify specific confidentiality concerns and put in place appropriate measures to protect their identity and any information provided.
- 7.8 As set out in paragraph 6.16 of the guidance, the CMA will take account of its Prioritisation Principles in determining what action to take following receipt of complaints. Paragraphs 6.57 to 6.60 of the guidance then set out the CMA's approach to responding to compliance concerns. The CMA considers that effective resolution of concerns could be supported by third parties engaging directly with SMS firms about their compliance concerns to give SMS firms an opportunity to resolve the issue before escalating a complaint to the CMA.

However, the CMA recognises that this approach may not always be possible or appropriate, for instance if the complainant does not feel able to share information with the SMS firm for confidentiality reasons. The CMA will therefore still prioritise complaints where the complainant has not been able to engage with the SMS firm.

- 7.9 The type of information that the CMA expects to see in a complaint, as well as the appropriate format of any submission, will depend on the nature of the issue to which the complaint relates. However, the guidance notes that to enable the CMA to consider an issue, complaints should be well-reasoned and, where possible, accompanied by supporting evidence (paragraph 6.12).

Monitoring compliance

Nominated officer

Summary of responses

- 7.10 Some digital firms noted their broad support for the proposals relating to nominated officers and agreed that the burden for demonstrating compliance is appropriately placed on SMS firms subject to the competition requirements.
- 7.11 A range of respondents, including large digital firms, legal respondents, and industry groups were concerned that the nominated officer role was described too prescriptively in the draft guidance. These respondents considered that it was not necessary to state in the draft guidance that the nominated officer would likely need to be a senior manager with operational responsibility for a firm's business model, product design and/or strategy in relation to the digital activity, noting that there are alternative ways to fulfil the role whilst meeting the related statutory requirements.
- 7.12 A digital firm suggested the identity of nominated officer should be communicated to competing firms and nominated officers should provide third parties prior written notice of compliance plans and changes to compliance plans. However, a large digital firm considered that the requirement on the nominated officer to engage with relevant stakeholders (including users of the digital activity) about the firm's compliance plans was overly burdensome.
- 7.13 Another digital firm cautioned that where an SMS firm is subject to multiple competition requirements, nominated officers may not coordinate effectively (where multiple nominated officers are appointed) and suggested that the CMA may require firms to have coordinated compliance strategies or where possible, one nominated officer is appointed in relation to multiple competition requirements.

The CMA's views

- 7.14 The CMA recognises that there are likely to be individuals with alternative responsibilities from those the CMA previously outlined in the draft guidance, who may be appropriate nominated officers and able to satisfy the statutory requirements of the role. The guidance has therefore been updated to remove this description of who a suitable nominated officer might be. It has also been amended to provide further clarity that the nominated officer should have sufficient visibility over decisions in respect of the relevant digital activity to the extent necessary to secure compliance and fulfil their statutory functions.
- 7.15 The guidance sets out the CMA's expectations of the individual appointed as nominated officer, which amongst other things, includes to engage as reasonably appropriate with relevant stakeholders about the firm's compliance plans (paragraph 6.36(d)). To effectively perform this function the CMA expects the SMS firm will need to communicate clear routes of engagement for third parties. The CMA continues to consider that engaging with stakeholders as reasonably appropriate about its compliance plans is an important and necessary function of the nominated officer.
- 7.16 The guidance provides flexibility on the number of nominated officers an SMS firm may appoint, noting that SMS firms may appoint the same person as nominated officer for multiple competition requirements. The CMA does not see a case for amending the guidance further on this point.

Compliance reports

Summary of responses

- 7.17 Several respondents welcomed the opportunity to be consulted on the contents of compliance reports and appreciated the value and use of these to third parties. However, one large digital firm considered consulting on compliance reporting obligations in addition to the proposed remedy itself risks overwhelming third parties.
- 7.18 A digital firm agreed that there should be separate compliance reporting requirements for each competition requirement. Other respondents highlighted the need for coherence of reporting obligations across different regulatory obligations.
- 7.19 Some respondents sought further clarity on other aspects of compliance reporting (eg on timeline and frequency). A large digital firm cautioned against overly onerous reporting requirements.

- 7.20 Many respondents welcomed proposals in the draft guidance requiring an SMS firm to typically publish a summary compliance report. However, some respondents suggested the CMA should require SMS firms to publish a summary compliance report without exception, or that the CMA should stipulate in the draft guidance when it would not be expected. In addition, another respondent suggested that the draft guidance should say that the summary compliance report is published in a readily identifiable place.

The CMA's views

- 7.21 In relation to the coherence of compliance reporting obligations, the CMA will take into account existing compliance reporting when setting new requirements, including in relation to the frequency and timing of compliance reports.
- 7.22 With respect to requests for further clarity on compliance reporting, the nature of compliance reporting obligations will be specific to the competition requirement to which they relate and so will be set out in the notice published at the time of imposing the requirement. As noted in the guidance (paragraph 6.44) the CMA will typically consult on proposed compliance reporting obligations, meaning stakeholders, including SMS firms, will be able to share views in relation to the onerousness of reporting requirements which the CMA will consider.
- 7.23 The guidance has been updated to clarify that the CMA will always require the SMS firm to publish either a copy of the complete compliance report or summary compliance report at paragraph 6.48. The CMA has also amended the guidance to require the compliance report or summary compliance report to be published in a readily identifiable place on the SMS firm's website to ensure it is accessible to users.

Responding to compliance concerns

Summary of responses

- 7.24 Several respondents welcomed proposals relating to the participative resolution of compliance concerns, agreeing that it would allow for quick and effective resolution of issues. However, some sought additional detail on how it may work in practice, for example around timelines, how the CMA would be transparent in its engagement with SMS firms, and how it would identify relevant third parties.

- 7.25 Other respondents, including several publishing industry respondents, warned that relying on the participative approach to resolve compliance concerns should not unduly delay enforcement action.
- 7.26 A digital firm agreed with the approach in the draft guidance for SMS firms to consult with third parties when proposing voluntary undertakings to address compliance concerns and considered it should take place as a matter of course. Another respondent suggested any voluntary undertakings should be published. On the other hand, a large digital firm, sought greater clarity on how the process for consulting third parties on voluntary undertakings would work in practice.

The CMA's views

- 7.27 The CMA considers that participatively engaging with SMS firms and other stakeholders to resolve issues will enable it to do so faster and in a more agile way than only using the CMA's formal enforcement powers. The format and timeframes for participative resolution of compliance concerns will depend on the nature of the issue and may therefore vary on a case-by-case basis. In relation to transparency with SMS firms, the CMA will need to balance providing sufficient information to enable the SMS firm to take action with protecting the confidentiality of those providing the CMA with sensitive information. The CMA will consider the most appropriate mechanism for identifying third parties depending on the case. This might, for instance, be informed by the CMA's wider monitoring work.
- 7.28 The CMA notes the concerns raised by some respondents that participative resolution of compliance concerns may unduly delay enforcement action. Where the CMA considers that it is not appropriate to address a concern through participative resolution, or such resolution does not progress quickly enough, it will use its formal enforcement powers (see paragraph 6.60).
- 7.29 As set out in paragraph 6.59(c) of the guidance, where an SMS firm seeks to propose voluntary undertakings to resolve compliance concerns the CMA may require the SMS firm to engage relevant third parties it considers could be affected by its proposals before the CMA agrees to accept the undertakings.

Monitoring effectiveness

Summary of responses

- 7.30 Several respondents welcomed the CMA's proposed approach to reviewing the effectiveness of interventions on an ongoing basis, including the CMA's proposals to publish the metrics against which the CMA would assess the

effectiveness of competition requirements. However, two large digital firms sought greater detail on the standards of effectiveness monitoring that the CMA will use and the process for conducting reviews.

- 7.31 A digital firm welcomed the opportunity to be consulted on metrics against which the CMA will assess the effectiveness of competition requirements and suggested that the CMA should consult on the proposed metrics as a matter of course.
- 7.32 Several respondents shared a range of views about specific metrics that might be appropriate to assess effectiveness. These included suggestions that the CMA should not rely too much on consumer behaviour, that improvements in competitive conditions should be interpreted as meaning that interventions are effective and therefore should be retained, and encouragement to draw on external market measuring data where available.

The CMA's views

- 7.33 As set out in paragraph 6.64 of the guidance, the CMA will refer to the original purpose / aim of the competition requirement as the basis for its reviews of effectiveness. The CMA will provide further clarity on the metrics it may seek to draw on at the time of imposing the competition requirement.
- 7.34 As noted in paragraph 6.66 of the guidance, the CMA may also consult on the metrics it may use to review the effectiveness of competition requirements.
- 7.35 The CMA has noted the comments made by respondents and will consider the most appropriate metrics to draw on to review the effectiveness of competition requirements at the time they are imposed. The specific metrics that the CMA uses will depend on the competition requirement and as noted above, the CMA may seek views from stakeholders on appropriate metrics prior to imposing competition requirements.

8. Enforcement of competition requirements

- 8.1 Just under two thirds of respondents to the consultation commented on the draft guidance on enforcement of competition requirements. Respondents were a mix of large digital firms, other digital firms, publishing industry bodies, legal respondents, trade bodies and consumer organisations. A number of respondents, including digital firms and other industry respondents, expressed overall support for the approach and supported the use of enforcement tools following participatory engagement on compliance concerns. Other respondents sought additional clarity on certain elements of the CMA's approach to enforcement.

Investigations into suspected breaches of competition requirements

Investigation procedure

Summary of responses

- 8.2 A range of comments were made in relation to the proposed procedural elements of enforcement investigations, including:
- (a) Several respondents emphasised the importance of third-party engagement and asked for more clarity on when and how this will be done. For example, some respondents suggested that the CMA should always consult with third parties when conducting investigations and make this more explicit in the guidance.
 - (b) Several respondents observed that there should be sufficient time and opportunity for SMS firms and third parties to engage at each relevant step in the process. Some respondents queried when provisional findings would be made, and one said the CMA should always publish these. Respondents also sought greater commitment to oral representations and clarity as to when firms would not be given the opportunity to provide such representations.
 - (c) A handful of respondents commented on initial assessments, seeking clarity on what information would be shared with SMS firms and the scope and timing of the assessment. Two respondents said the CMA should always allow SMS firms to comment on compliance concerns.
 - (d) A large digital firm said that the investigations into CRs and into other competition requirements should be treated consistently, in particular in

relation to the tests for opening investigations, the timetable, and the approach to notifying firms of the closure of an investigation.

- (e) Another large digital firm said that the guidance, or future versions, should explain how the CMA will typically approach private standalone litigation.

The CMA's views

8.3 The CMA has carefully considered the feedback and made a number of changes to provide more clarity on the engagement it expects to have with stakeholders in the context of enforcement investigations:

- (a) The guidance has been amended to add a table setting out the key stages of engagement that the CMA expects typically to take place during an enforcement investigation between the CMA and stakeholders, including the firm under investigation and third parties. The table is intended to aid stakeholders' understanding of how the CMA will typically engage them in its processes. It should be read alongside the detailed guidance which sets out the full procedure that the CMA will follow. The steps in the process and the nature and extent of anticipated engagement may vary depending on the nature of the breach investigation.
- (b) The CMA has also amended the guidance at paragraph 7.19 to commit to publishing case-specific administrative timetables at the start of any enforcement investigation. This timetable will be regularly reviewed and updated as necessary during the case to ensure the firm under investigation and interested stakeholders are kept updated on the status of the case.
- (c) The guidance has been amended to make clear that the commencement of investigations will be made public (paragraph 7.19). The CMA has also provided additional detail on the use of information notices, including that it may send such notices to key market participants, as well as recognising that it may also utilise other information gathering powers where appropriate. In addition, the CMA will typically publish an update on its website when it issues a firm with provisional findings.
- (d) The CMA has amended the guidance at paragraph 7.24 to provide a firmer commitment that the CMA will always give firms the opportunity to provide oral representations where the investigation is into an alleged breach of a CR. However, in other cases the CMA may

consider that there is less need to provide the firm with an opportunity to make oral representations and that written representations are sufficient, for example some enforcement order ('**EO**') or interim enforcement order ('**IEO**') breach investigations may be very narrow in nature.

- 8.4 In relation to allowing an SMS firm to comment on compliance concerns, the CMA will generally provide SMS firms with an opportunity to comment on concerns as part of the initial assessment. In addition, the SMS firm may be aware of concerns through the participative resolution process that may have preceded initial assessment.
- 8.5 With respect to the differences between investigations into potential breaches of CRs and other competition requirements, the guidance seeks to follow the legislation, which sets out procedure for the former and not the latter. There is no statutory timetable for the length of investigations into potential breaches of other competition requirements and the timetable will likely vary on a case-by-case basis due to the wide variety of potential competition requirements and potential breaches involved. However, the guidance has been amended at paragraphs 7.34 and 7.38 to clarify that the outcome of all breach investigations will be made public on the CMA website.
- 8.6 Regarding private litigation, the purpose of the guidance is to set out the CMA's approach to public enforcement and administration of the digital markets competition regime. The CMA will continue to use public statements to set out its broader approach to private enforcement.

Disclosure of evidence

Summary of responses

- 8.7 Approximately one-third of respondents to the consultation commented on the draft guidance on disclosure of evidence for the purposes of enforcement of competition requirements.¹⁸
- 8.8 The draft guidance outlined that the CMA will adopt a flexible case-by-case approach to disclosure. A number of respondents objected to the case-by-

¹⁸ When reviewing the responses, it was not always clear whether respondents were raising concerns specifically in relation to disclosure during an enforcement investigation or whether their concerns applied to all CMA investigations under the digital markets competition regime, including initial SMS designation investigations. Chapter 7 of the draft guidance focused on the CMA's proposals for disclosure during enforcement, in other words, in investigations into breaches of competition requirements.

case approach to disclosure on the basis of the importance of enforcement decisions and limited time for investigations.

- 8.9 Some respondents raised concerns about the CMA providing firms with the gist of relevant information in a provisional breach finding decision. In particular, that such an approach was not compliant with ECHR rights and rights of defence within the context of enforcement proceedings. A number of respondents wanted an explicit statement within the guidance that firms' right of defence would be respected. Conversely, a digital firm set out that the CMA should not focus on firms' right of defence to the detriment of other affected parties.
- 8.10 Some respondents requested that disclosure should be in the form of full 'access to file' and/or that firms should be provided with a comprehensive list of all evidence held and should have the right to request underlying documents. An alternative approach suggested was for the CMA to default to providing firms under investigation with access to all non-confidential versions of documents provided by complainants and third parties.
- 8.11 Some respondents also commented on the CMA's proposed use of a confidentiality ring or data room:
- (a) Two digital firms made suggestions to ease the administrative burden of engaging in confidentiality requests and avoid delays. These were organising a confidentiality ring ahead of time for frequent stakeholders or putting this in place at the outset of a case.
 - (b) Where a confidentiality ring is used by the CMA, another digital firm set out that, in addition to a condition of access, information reviewed by advisers should not be shared with the firm without the consent of the CMA. It should also be limited to a specific defined purpose of the SMS firm exercising its rights of defence in relation to the non-compliance investigation.
- 8.12 Some respondents said that the draft guidance had insufficient detail on the timing of any disclosure and what, if any, information would be disclosed at the outset of a case, such as during the initial assessment as to whether to open an investigation.
- 8.13 A number of respondents advocated for third parties to have a greater role in the investigative process, with requests for third parties to see the evidence in the case.

The CMA's views

- 8.14 As outlined in the draft guidance, the CMA is very conscious of the need to take decisions in relation to disclosure with firms' ECHR rights, due process, and third parties' legitimate interests in mind, alongside the need to ensure procedural fairness. Such decisions must be made on a case-by-case basis taking account of all the facts and circumstances of a case at hand. For that reason, the approach to disclosure will always be dictated by the needs of a particular case and the CMA's guidance remains unchanged.
- 8.15 Comparisons with other jurisdictions are not straightforward and may be inappropriate because each overseas authority is operating under a different legal framework. In preparing the guidance, the CMA has sought to ensure that the approach and procedures relating to disclosure are appropriate and effective for the regime established by the Act and that they reflect the legislative intent to confer a wide degree of discretion as to the disclosure process given to the CMA as an expert regulator. The CMA considers that it is important and appropriate that guidance is flexible enough to allow the CMA to adopt the most appropriate approach to disclosure depending on the facts and circumstances of the case at hand and this is compatible with ordinary standards of procedural fairness. Such factors may include any statutory timeframes, as well as the volume and nature of information gathered by the CMA and to whom the information belongs. In all cases, the method of disclosure adopted will enable the firm under investigation to exercise its rights effectively.
- 8.16 Gist is a well-understood concept in legal terms and involves the communication of the substance of a public authority's case, including evidence on which it seeks to rely on. The courts have recognised that in terms of competition investigations, disclosure of the gist is likely to involve a high degree of disclosure and transparency on the part of competition authority due to the technical nature of the evidence.¹⁹ The CMA considers therefore that provision of the gist is likely to be satisfactory in digital markets investigations, which also possess a high degree of complexity.
- 8.17 However, as outlined above, the CMA will approach disclosure on a case-by-case basis. The CMA acknowledges that in some cases an approach similar to 'access to file' may be appropriate and that in others the CMA may decide disclosure by way of list would be more appropriate and effective to provide adequate disclosure given the timing constraints on investigations under

¹⁹ *BMI Healthcare Limited v CMA* [2013] CAT 24

statute. The CMA does not therefore consider that it would be appropriate to adopt a default position in every case.

- 8.18 In relation to the comments and suggestions in relation to the use of confidentiality rings and data rooms:
- (a) The CMA is of the view that having an ongoing set of obligations for disclosure of sensitive information into confidentiality rings for frequent stakeholders, could lead to a risk that confidential documents are inadvertently shared if any potential conflicts of interest are not fully canvassed in advance each time for each separate investigation. Further, the CMA considers that ongoing confidentiality rings are unlikely to be appropriate to be used on a routine basis. As set out in the draft guidance, confidentiality rings are one option amongst several for the purposes of disclosure, whether that be for consultation purposes or for SMS firms to understand the CMA's case.
 - (b) Access to documents in a confidentiality ring or data room will be subject to confidentiality undertakings provided by the persons with access (and for employees, their employer firm) which address, amongst other matters, how they may use the information disclosed to them and the restrictions that apply to onward disclosure. It will typically be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with their client(s) and that collateral usage for any other purpose is not permitted, but the particular conditions of access will be set out by the CMA on a case-by-case basis.
- 8.19 In relation to requests for more clarity on the timing of any disclosure, the CMA considers it inappropriate to delineate a formal disclosure process at the outset of investigations or prior to launching them. The CMA also notes that this is not the practice across other tools, including investigations such as under Competition Act 1998. Additionally, in relation to questions about what would be disclosed in relation to the initial assessment and the timing of any such disclosure, the CMA's view is that the extent of engagement with parties and the timing of such engagement and disclosure will be dependent on the nature, facts and circumstances of a particular case and the nature and volume of information and evidence relied on by the CMA.
- 8.20 The CMA will take a flexible approach to sharing its emerging thinking and/or evidence with parties directly involved and (if appropriate) other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of their case and the need to ensure that the approach to disclosure is fair so that there is a level playing

field between different market participants. The CMA may share its emerging thinking or evidence when doing so would be helpful to the progression of the case at appropriate stages, to verify the information it has received or when it is otherwise appropriate to do so. Conversely, in other circumstances it may be inappropriate to provide such information to stakeholders for their views earlier as it may not allow the parties to understand the full case, and therefore limit their ability to make submissions. For this reason, the CMA does not consider that it would be appropriate to publish bilateral conversations between the CMA and large digital firms.

Enforcement of CRs

Interim Enforcement Orders

Summary of responses

8.21 Respondents suggested the guidance should clarify that IEOs, in the same way as EOs, may be framed as positive or negative obligations and should set out a more detailed definition of public interest for the IEO assessment. Two respondents asked for inclusion of a minimum guaranteed period for firms to make representations and/or for examples of where the CMA may not give firms this opportunity. In addition, a large digital firm asked for more clarity on the likely timing of an IEO being made.

The CMA's views

- 8.22 For clarity, the CMA has amended the guidance at paragraph 7.47 to reflect that IEOs may impose positive or negative obligations (as for EOs).
- 8.23 Having considered the comments in relation to IEOs, the CMA considers the guidance is already clear on these points:
- (a) With respect to the definition of public interest, the guidance provides examples in paragraph 7.50(c) which the CMA considers give sufficient explanation of the criterion.
 - (b) In terms of timing, it is important that the CMA retains the ability to put an IEO in place at any time during an investigation (for example in response to a firm's conduct during the investigation). However, in practice it is likely that IEOs will be imposed early in the timeline of any conduct investigation.
 - (c) The guidance follows the legislation in allowing the possibility that representations may not always be sought prior to making an IEO (for

reasons set out in the guidance). However, the CMA must consider any representations received on the IEO after it is made, as set out at paragraph 7.56 of the guidance. Any time-period for making representations will be decided on a case-by-case basis and communicated clearly to those involved at the time of the investigation but is likely to be short given the time-critical nature of IEOs and the context of a six-month investigation period.

The Countervailing Benefits Exemption

Summary of responses

- 8.24 Some respondents expressed general support for the CMA's approach to the countervailing benefits exemption ('**CBE**'). Others commented on the CMA's approach to assessing the CBE, including on the evidential basis for the CBE. Several respondents were supportive of the overall approach in the CMA's draft guidance that it will expect SMS firms to provide new evidence when assessing the CBE. However, others asked for the expectation of new evidence to be either removed or made clearer, for instance to allow SMS firms to explain why previous submissions are of relevance or to recognise that there could be further evidence related to previous submissions. Two respondents made comments around how the guidance could reflect the potential for SMS firms to hold back evidence that could have reasonably been provided at an earlier stage when the CR was being imposed.
- 8.25 Respondents also commented on the CMA's guidance on the five conditions that must be satisfied for the CBE to be met.
- (a) Various comments were made that related to the concept of 'users' in the CBE assessment, including suggestions around its definition and the CMA's approach to condition 1 (benefits to users or potential users).
 - (b) The most common area that respondents commented on was condition 3 of the CBE assessment and the statement in the draft guidance that the condition imposed a standard akin to the 'indispensability test'. On the one hand, many respondents including trade bodies, publishing industry, digital firms, consumer organisations and other industry respondents were supportive of this approach, and several stated that it was in line with reassurances they had received from government or Ministers. On the other hand, several large digital firms and legal respondents were not supportive of the inclusion of the 'indispensability test' in the draft guidance, saying that it goes beyond the Act and sets a very high bar.

(c) A few respondents made comments about proportionality (condition 4) in the CBE assessment. Generally, respondents sought clarity on the CMA's approach. A legal respondent suggested guidance should clarify how the CMA will assess representations from SMS firms regarding proportionality of conduct to the realisation of benefits.

8.26 There were also some comments on the procedure for the CBE:

(a) One respondent stated that SMS firms should be able to make CBE representations to the CMA at any stage of a conduct investigation. Some respondents also said that the timeframe of the CBE assessment should be made clearer, while others stressed the need for inclusion of more third-party engagement throughout the CBE process.

(b) In addition, one respondent suggested that engagement of independent experts in the CBE assessment should be a rule not an exception, and another said that the guidance should provide more detail on how the CMA will consult with other regulators where relevant (such as the Information Commissioner's Office ('ICO') on privacy matters).

The CMA's views

8.27 In relation to the comments on the evidential basis for the CBE, the CMA remains of the view that where it has considered the loss of particular benefits to users or potential users at the point of imposing the CR, firms should not simply restate the same submissions on those same benefits where it seeks to invoke the CBE in a conduct investigation. The guidance has been amended (paragraph 7.68) to clarify the CMA's expectation that firms should explain clearly why any previously provided material is relevant and how it supports the firm's view that the conduct under investigation satisfies the CBE conditions. Firms may also wish to provide further evidence relating to the existence or extent of the (previously-considered) benefits which could not have reasonably been provided at the time the CR was imposed.

8.28 The CMA has considered the comments made by respondents on the approach to assessing CBE and the specific issues raised in relation to each of the five conditions:

(a) The guidance does not define or limit users to a certain type of user under condition 1 (ie business users or consumers or end users) to allow for a full consideration of users who could benefit from the conduct. This therefore remains unchanged.

- (b) The CMA considers that the guidance on condition 3 reflects the discussions of this condition during the extensive Parliamentary debate on this issue throughout the passage of the Act, during which Ministers clarified that the wording of condition 3 in section 29(2)(c) of the Act imposes the same high threshold as a test based on indispensability. The CMA has therefore not amended the guidance on this point.
- (c) The specific approach to the proportionality assessment under condition 4 and the relevant evidence will depend on the circumstances of the conduct under investigation as potentially breaching the CR and therefore the CMA does not consider it can provide further generic guidance on how this assessment will be approached.

8.29 Responding to comments on the procedure:

- (a) Under the Act, a conduct investigation must be completed within six months, including any CBE assessment. There is no specified point at which firms can provide representations on the CBE during an investigation, but the CMA would typically anticipate that a firm would submit these as soon as reasonably possible given the short statutory timeframe for conduct investigations.
- (b) The guidance states that the CMA will consider all relevant evidence in its assessment of the CBE, including relevant evidence provided by third parties. The CMA may seek further views from relevant third parties and stakeholders in its assessment of the CBE where appropriate; this will depend on the specific circumstances.
- (c) It also does not require reports by independent experts to verify the existence of benefits in all circumstances, but this could be one way in which a firm chooses to provide evidence to the CMA. The CMA may also engage with other regulators or stakeholders as necessary (see Chapter 9 of the guidance for further information on how the CMA will coordinate with other regulators).

Commitments

Summary of responses

- 8.30 A handful of respondents commented on the draft guidance on commitments and took opposing views on key points raised. A number of respondents commented either in support of the wording that acceptance of a commitment will 'likely be rare in practice' or questioned it, and respondents were equally

for or against the possibility that a commitment may need to be more extensive than an EO imposed by the CMA would be.

The CMA's views

- 8.31 The use of commitments being rare in practice reflects the short timeframes within which conduct investigations must be completed and the nature of the regime, which allows for compliance concerns to be addressed through participative resolution and/or raised prior to a formal investigation being launched. The CMA has therefore not amended the guidance on this point.
- 8.32 Furthermore, the potential for a commitment to need to be more extensive than an EO reflects the fact that commitments will normally be agreed earlier in an investigation than the issuance of an EO, which would come towards the end of an investigation. At the time of the commitment being agreed, it is likely that remedial options will be less refined than they would be at a later stage of investigation, and commitments may therefore need to be more extensive in order to offer sufficient confidence that they will address the behaviour of concern. The guidance therefore also remains unchanged on this point.

Enforcement Orders

Summary of responses

- 8.33 A handful of respondents commented on the guidance on EOs, some to express firm support. A large digital firm and a legal respondent asked for clarity on the timeframe for the imposition of an EO. They also sought reassurance that SMS firms will always be able to comment on draft EOs in advance of publication.
- 8.34 Other digital firms and a publishing industry body said that the CMA should always make public where it has given consent for a firm to act in breach of an EO to aid transparency.

The CMA's views

- 8.35 In relation to the provision of timings for imposing EOs, the CMA will generally issue an administrative timetable specific to the conduct investigation at launch, to provide transparency over key steps in the process and engagement points and will keep this updated throughout the investigation.
- 8.36 The guidance already states that the CMA will typically share with the SMS firm any draft EOs it intends to impose. Footnote 515 in the guidance explains that providing EOs in draft form is likely to be inappropriate where intervention

is required urgently or where the EO obligations are straightforward in nature (for example where the EO sets out a timeframe for implementing previously agreed remedies).

- 8.37 The CMA has clarified the guidance, via an additional footnote at paragraph 7.107, that consents in relation to breaches of EOs, will always be published in some form, although this may be in summary or a redacted version if the full consent contains confidential information.

The Final Offer Mechanism

Summary of responses

- 8.38 Some respondents made general comments on the final offer mechanism ('**FOM**'), such as support for the use of the FOM to bring disputes to resolution more quickly. In particular, several publisher and other industry respondents requested that the CMA expedite the timeline for progressing through the steps prior to initiating the FOM (a finding of breach of a CR and subsequent breach of an EO) in circumstances where earlier resolution seems unlikely.
- 8.39 Several respondents asked for clarity that the FOM does not require parties to enter a contract with specific counterparties (and/or does not prevent parties from exiting a contract). Some of these respondents pointed to the Explanatory Notes in relation to the CMA's consideration of freedom to contract at the point of imposing CRs.
- 8.40 Some respondents commented on the circumstances in which the CMA may initiate the FOM. In particular, two respondents sought more clarity on the CMA's approach to considering whether it could satisfactorily address the breach within a reasonable time frame by exercising any of its other digital markets functions, including a commitment to a minimum set of factors to consider. However, most of the other respondents who commented on this, set out that given the FOM process takes six months, the CMA should not normally consider using other digital markets functions that would take longer than that.
- 8.41 On the FOM process, one large digital firm said that there was a lack of certainty in the timeline for the FOM process and that the CMA should set out how the steps fit into the six-month window and the relative points at which they will occur.
- 8.42 Respondents made a range of comments about collective submissions:

- (a) There was support for the ability of third parties to group together to submit collective submissions in a FOM process. However, respondents sought clarity on when the CMA would invite parties to be joined or grouped in a FOM process and whether the CMA could require parties to be joined or grouped if any of the parties opposed it. Some publishing industry respondents said that the CMA's principal consideration in whether to invite parties to make a joint or grouped bid should be whether the parties themselves want to be joined.
- (b) Relatedly, some respondents said that a desire to be grouped should be a strong indication that there are not key differences in the third parties' circumstances or bargaining power and that the CMA should not prevent such third parties from submitting a collective submission under the FOM.
- (c) Two respondents asked for greater clarity on how collective submissions would interact with competition law requirements around sharing competitively sensitive information and asked for further advice from the CMA on this.

8.43 There were a handful of comments on information sharing between parties in a FOM process, and generally respondents set out that the CMA should strengthen the guidance on this to allow for greater information sharing so that third parties were better able to negotiate with SMS firms.

8.44 Several respondents said the guidance should include additional information about how the CMA will assess bids in a FOM process and what the factors might be. For example, some of these respondents suggested that these factors include an assessment of the indirect and direct costs to the SMS firm of delivering the service and the benefits arising to the third party.

The CMA's views

8.45 The CMA has carefully considered all the feedback received on the FOM. In relation to requests to expedite the timeline before the FOM, as noted in guidance in paragraph 7.120 the speed by which the CMA can initiate FOM may vary for several reasons, including the conduct of the SMS firm in attempting to reach an agreement with a third party or parties. However, the CMA has amended the guidance at paragraph 7.126 to clarify that the FOM can be used once other steps prior to and during the enforcement process to secure compliance have not succeeded.

8.46 The CMA notes the points regarding the FOM not being a suitable tool to require firms to enter (or prevent them from exiting) contracts, as this may infringe on parties' freedom of contract. The CMA expects to consider any

issues regarding freedom of contract at the time it imposes a CR requiring fair and reasonable payment terms with respect to specific arrangements or transactions (see paragraph 4.25 above). The FOM is the process by which the CMA can set a price (through a final offer order) in relation to the arrangement or transaction that was subject to the original CR (where it and a subsequent EO have been breached).

- 8.47 In relation to the CMA's assessment as to whether it could not satisfactorily address the breach within a reasonable timeframe by exercising any of its other digital markets functions,²⁰ the CMA has amended the guidance at paragraph 7.129 to say that it will consider the time it would take alternative measures to take effect compared with the anticipated length of the FOM process.
- 8.48 The CMA has amended the guidance to add a table setting out the key stages of engagement that the CMA expects typically to take place during a FOM process between the CMA, SMS firm and third party or parties. The table is intended to aid stakeholders' understanding of how the CMA will typically engage them in the FOM process. It should be read alongside the detailed guidance which sets out the full procedure that the CMA will follow. In response to requests for additional clarity on the timing of each step within the six-month FOM window, the CMA will also publish an administrative timetable at the point at which the FOM is initiated to give clarity over how the process will run for each case including the key engagement points (paragraph 7.135). The timetable will be regularly reviewed and updated as necessary during the process.
- 8.49 On collective submissions:
- (a) the CMA can invite multiple third parties to make a single submission in a FOM process where certain conditions are met (paragraph 7.142). However, to clarify, the CMA cannot compel a third party to participate in a FOM process (as part of a collective or otherwise).
 - (b) the CMA notes the point made by respondents that the parties' willingness to be joined or grouped should be part of the CMA's consideration when inviting third parties to make a collective submission. This consideration is not determinative in and of itself, given the CMA must satisfy itself, under the Act,²¹ that the parties are capable of acting

²⁰ Section 38(4) of the Act.

²¹ Section 39(1)(b) of the Act.

jointly. However, the CMA has amended the guidance (paragraph 7.143b) to recognise this point as part of its consideration.

- (c) the CMA also recognises the concern raised about the potential interaction between competition law and collective submissions on pricing through a FOM process. Parties involved in a FOM collective submission should seek appropriate legal counsel on these issues at the relevant time. However, the CMA and government have published a range of resources related to this topic that may be useful for parties to consider.²²

- 8.50 The CMA has not changed its guidance around information sharing between parties in a FOM process. The guidance refers to how the CMA will handle confidential information, including as part of a FOM process, such as seeking views on confidentiality from the party claiming it. In response to calls from respondents to share additional information beyond that which may be needed to facilitate the formation and submission of bids, the CMA notes that any information sharing is subject to statutory restrictions under Part 9 of the EA02 (see guidance paragraphs 5.94 to 5.100).
- 8.51 The CMA's specific assessment of bids will be on a case-by-case basis given the range of transactions and parties that the FOM could apply to. However, the CMA has added some detail in the guidance at paragraph 7.148 on how it will assess bids in a FOM process, noting that it will consider the underlying calculations that have been used to inform the bid and the supporting evidence sources used by the parties.

²² Resources that may be of interest to parties involved in collective submissions: [Managing competitively sensitive information](#), [Guidance on horizontal agreements](#), [Cheating or competing](#), [Trade Associations: are you complying with competition law?](#)

9. Penalties for failure to comply with competition requirements

- 9.1 Just under a third of respondents to the consultation commented on the draft guidance on penalties for failure to comply with competition requirements. Respondents were a mix of large digital firms, legal respondents, other digital firms, trade bodies and consumer organisations. Some respondents gave broad support for the CMA's approach to penalties, whilst others sought greater specificity and detail.

The role of penalties and the CMA's approach

Overview of the CMA's approach

Summary of responses

- 9.2 A range of respondents made general supportive comments on the overall approach the CMA had taken to the draft guidance on penalties and emphasised the importance of imposing meaningful penalties against failures to comply. Many of these respondents also emphasised that penalties need to be sufficient to act as a deterrent and not be written off as a cost of doing business. Other general observations that respondents made included that the participative nature of the regime should not discourage the CMA from imposing penalties and that imposing them should not be seen as exceptional.
- 9.3 Some respondents queried how the CMA's guidance, *Administrative Penalties: Statement of Policy on the CMA's approach ('CMA4')*, relates to the penalties guidance.

The CMA's views

- 9.4 To clarify, under the Act, the CMA is required to prepare and publish a statement of policy in relation to the powers to impose a penalty under sections 85 and 87, relating to penalties for failures to comply with competition and with investigative requirements. The guidance has been amended to make it clearer that the CMA's statement of policy is contained in two guidance documents which should be considered together (one does not supersede the other):
- (a) *Administrative penalties: Statement of policy on the CMA's approach (CMA4)* – covers failures to comply with investigative requirements

(section 87), merger reporting requirements (section 85(4)) and IEOs (section 85(2)); and

- (b) *Guidance on the digital markets competition regime* (Chapter 8) – covers failures to comply with competition requirements (sections 85(2) and 85(3)), except IEOs (section 85(2)).

Whether to impose a penalty and the type of penalty imposed

Summary of responses

- 9.5 Some respondents sought greater clarity around aspects of the CMA's approach to when and in what form it expects to impose a penalty. For example, asking the CMA to provide more clarity on when the CMA may deviate from its standard approach to imposing penalties; the meaning of specific points in the factors the CMA will consider when deciding whether to impose a penalty, such as the term 'serious'; and when the CMA might impose daily or fixed penalties, or both.
- 9.6 In addition, some respondents suggested changes to the draft guidance on how the CMA will consider whether to impose a penalty and the type of penalty imposed. This included suggestions to limit the circumstances in which the CMA should impose a penalty (for example, to only when the failure to comply is intentional or deliberate and not to impose penalties where a failure has been remedied except in exceptional circumstances). Some legal respondents sought more detail on the broad levels of penalty and how the factors might affect the penalty level.
- 9.7 A handful of respondents commented expressly on the draft guidance on reasonable excuse. Two disagreed with the CMA's view that it would be unlikely to accept as a reasonable excuse any claim that non-compliance is required under an agreement, contract or data protection laws. Others asked that the guidance include specific examples that would constitute a reasonable excuse, some pointing to the examples in CMA4 and suggested they should also apply.

The CMA's views

- 9.8 Paragraph 8.11 of the guidance already sets out where the CMA may be more likely to impose a penalty and includes factors such as where the failure to comply is intentional. The CMA does not consider it would be appropriate to limit its ability to impose penalties, given that there are no such limitations in the Act.

- 9.9 The guidance sets out that the CMA’s approach to imposing a penalty will not be mechanistic or one-size-fits all. Therefore, in general, because the CMA’s approach to penalties will be heavily dependent on the specifics of the case and the context of the related failure to comply, the CMA does not consider it appropriate to add more detail or examples around the specifics of the factors it will consider when deciding whether to impose a penalty and what type, or to provide indicators of the level of penalty (eg seriousness/significance of the failure to comply/reasonable excuse).
- 9.10 With respect to the guidance on reasonable excuse:
- (a) The CMA has removed the reference to data protection law as a reasonable excuse from guidance. By its inclusion in draft guidance, the CMA had not intended to suggest that there would be an expectation that firms should have to choose between complying with data protection law and competition requirements under the Act.
 - (b) The CMA has also added information around the role of foreign law as a reasonable excuse which was recently consulted on in CMA4. This guidance at paragraphs 8.19 and 8.20 explains the CMA’s approach where an undertaking claims that it has a reasonable excuse for non-compliance because doing so could put it in breach of foreign law. Every claim of this nature will be considered on its facts.
 - (c) The CMA continues to consider that fulfilment of a contract or agreement would not be a reasonable excuse for non-compliance with a statutory competition requirement.

Steps for determining the level of penalty

Summary of responses

- 9.11 Two respondents set out that relevant turnover should be limited to the product or geographic market to which the designation applies, pointing to the approach taken in Competition Act 1998 cases, and one stated that without this limitation the starting point for the penalty calculation would be too high. One of these respondents also said that the CMA should only deviate from its typical approach to calculating relevant turnover or use information other than audited accounts (such as business plans), in specific and limited circumstances. In addition, one legal respondent said the guidance should include a list of factors the CMA would take account of when considering if it would be appropriate to deviate from the typical approach to determining relevant turnover.

- 9.12 A small number of respondents commented on the assessment of seriousness section of the draft guidance. One stated that the CMA should indicate where it typically expects the range of percentage starting points to be and suggested that a lower starting point of 10 to 20% would be sufficient. Another said that the CMA should provide further explanation of what factors it will consider to assess seriousness and how it will measure them.
- 9.13 A number of respondents commented on the CMA's approach to the adjustment for deterrence:
- (a) Some respondents said that the calculation of gains, including those that may accrue to the undertaking in areas or activities beyond those associated with the failure to comply, need to be sufficiently detailed. In addition, one large digital firm asked how the SMS firm could review the calculation and what opportunities there would be for consultation.
 - (b) One respondent asked for clarification that the adjustment for deterrence would also include consideration of general deterrence as well as specific deterrence. Another suggested that the CMA remove the statement that it considers it 'likely to be necessary to impose significant penalties on undertakings to achieve the required deterrent effect...'
 - (c) One large digital firm said the CMA should make it clear when the CMA will depart from worldwide turnover as its primary indicator for the purposes of assessing size, economic power and financial position of the firm.
- 9.14 Several respondents made suggestions for additional factors which the CMA should consider as aggravating or mitigating factors. For example, suggestions to consider as mitigating factors included the conduct of the firm in related compliance processes and their efforts to rectify failures to comply. Relatedly a respondent asked what 'meaningful cooperation' might mean. Suggestions on aggravating factors included: limiting unreasonable behaviour to only that which is persistent and repeated and capturing scenarios where firms seek to delay the process by providing late, or unnecessarily long submissions.
- 9.15 In relation to ensuring the penalty is proportionate, one large digital firm and one legal respondent said the CMA should include the factors the CMA would consider in checking proportionality, referring to the guidance in the *CMA's guidance as to the appropriate amount of a penalty* ('**CMA73**'). The legal respondent said the CMA should explicitly account for fines imposed on undertakings for infringements involving the same facts of other national rules and the overall level of penalties imposed.

The CMA's views

- 9.16 With respect to the calculation of relevant turnover (in calculating the starting penalty and checking the penalty does not exceed the statutory maximum), the CMA has made some changes to the guidance to reflect the Turnover Regulations that had not been finalised prior to publication of the draft guidance (see paragraphs 8.28 and 8.45 to 8.55). Relatedly, the CMA recognises the concern raised around the potential use of information other than audited accounts, such as forward-looking information, to inform relevant turnover and has removed reference to business plans and compensation schemes in its non-exhaustive list of possible information sources. In relation to concerns that UK turnover would be too high a starting point, the CMA notes that any penalty imposed will be subject to checks to ensure it is proportionate and does not exceed the statutory maximum, and therefore has not made any changes to guidance on this point. As mentioned above, given the case-specific nature of the CMA's approach to penalties, the CMA considers that it would not be appropriate to specify in what circumstances it may deviate from its standard approach to calculating relevant turnover (UK and worldwide), however it will consider whether it is appropriate to add examples in future versions of guidance.
- 9.17 The CMA has also not made any changes to its approach to adjusting the level of penalty for deterrence. In proposing the draft guidance, the CMA has drawn on existing experience of imposing penalties across its other tools and notes that the adjustment will be dependent on the specifics of the case. The CMA will operate with transparency and undertakings will be given a reasonable opportunity to make representations on the provisional penalty notice. The CMA will consider general deterrence (to deter other undertakings or third parties from non-compliance) as well as specific deterrence in its consideration. It also continues to think significant penalties are likely to be required to achieve the deterrent effect given the significant financial position required of an undertaking by the SMS turnover condition.
- 9.18 The CMA has added a footnote (at paragraph 8.40b) to provide further clarity on meaningful cooperation. The CMA also considers that some of the other points raised by respondents on aggravating and mitigating factors could already be accounted for in other steps in the calculation of the penalty. The CMA notes the point made by respondents that action by the firm to mitigate a failure could be considered as a mitigating factor when it determines the level of penalty. Such a determination would be made on a case-by-case basis. The CMA has not changed the guidance given any such evidence would already be considered as part of the existing non-exhaustive list of mitigating factors (for example, cessation of the failure or meaningful cooperation).

- 9.19 The CMA has carefully considered the points raised by respondents on proportionality and has added some additional guidance on its consideration (paragraph 8.42), noting that it will consider all relevant circumstances of the failure to comply, including the nature of the failure, its impact and the undertaking's size and financial resources.

Penalties procedure

Summary of responses

- 9.20 There was a mix of views on the proposal to run a penalty case and breach investigation together and subsequently issue a provisional penalty notice at the same time as provisional findings on the breach (and where practicable take representations on both together). A handful of respondents explicitly agreed, and one legal respondent thought the guidance should be clearer that the processes will be done together as the CMA does in other procedural investigations. One large digital firm disagreed and questioned how the CMA can conduct a fair and objective investigation where it already has penalties in mind. In addition, other respondents thought there was merit in clearly delineating the two decisions, for example to mitigate the risk of a merits appeal on a penalty decision bleeding into the substantive decision on breach findings.
- 9.21 Several respondents referred to the need to ensure firms have reasonable and meaningful opportunities to make representations or comments on provisional penalty notices. Some of these respondents sought greater clarity on when the CMA can deem an oral representation not appropriate. Another said that the CMA should indicate the minimum time-period it will give firms to provide written representations.
- 9.22 A respondent also asked for specific clarification on how firms could request extensions on making representations, how the CMA would consider such extensions and what procedure would be in place for firms to complain about deadlines set.

The CMA's views

- 9.23 The CMA has added a clarificatory point into the guidance that it will seek to run a penalty case in parallel with a breach investigation where the nature of that investigation leads the CMA to consider that penalties may be appropriate. In addition, a footnote has been added to the guidance to state, for the avoidance of doubt, that, though a penalty case and a breach

investigation may run in parallel, the decisions made under each process are separate decisions.

- 9.24 The CMA considers that the guidance is clear that undertakings will be given a reasonable opportunity to make written representations on a provisional penalty notice and that the amount of time provided will be determined on a case-by-case basis. With respect to oral representations, the CMA expects that, in practice, undertakings will be able to make oral representations on provisional penalty notices alongside making oral representations on provisional breach findings, where these have been run in parallel. However, the CMA has amended the guidance to provide for the possibility that undertakings could make separate oral representations on a provisional penalty notice (at paragraph 8.61) where this is not the case.
- 9.25 The CMA will consider requests for extensions on a case-by-case basis, and they will only be given where there are compelling reasons to do so. In addition, the guidance has been amended in Chapter 9 to set out the CMA's approach to procedural complaints made about the exercise of its digital markets functions.

Penalties imposed on individuals

Summary of responses

- 9.26 A handful of respondents commented on the CMA's ability to impose penalties on senior managers and nominated officers under the Act. One respondent said that the CMA should use powers to impose penalties on senior managers (where applicable) as a rule, not an exception. Whilst on the other hand, a large digital firm and legal respondent thought that penalties should only be imposed on senior managers, either in exceptional circumstances, or where the breach is intentional or deliberate. Another respondent said that the CMA should clarify when it will impose such penalties on nominated officers and provide some non-exhaustive examples of what a reasonable excuse might be.

The CMA's views

- 9.27 The CMA's policy on imposing penalties on individuals is contained in CMA4 and the digital markets guidance has been amended to make this clearer, for example at the start of the enforcement chapter when CMA4 is referenced. CMA4 has also been updated to make it clear that the guidance contained within it applies to senior managers and nominated officers under the Act.

9.28 Stakeholders should read CMA4 for the CMA's complete policy on imposing penalties on senior managers and nominated officers (captured within the term 'Relevant Person' in CMA4). In particular, it sets out the factors that the CMA will consider when deciding whether to impose a penalty. These penalties can only be applied if a failure to comply is without reasonable excuse and CMA4 includes examples of what may or may not constitute a reasonable excuse for failures to comply by Relevant Persons. CMA4 has also been updated to include (in Annex 2), as one of a number of such examples, an illustrative scenario in which the CMA would be likely to impose a penalty on a nominated officer for a failure to comply with compliance reporting obligations.

10. Administration

- 10.1 Just under two-thirds of respondents to the consultation commented on the draft guidance on the administration chapter. Respondents were a mix of large digital firms, other digital firms, legal respondents, trade bodies and consumer organisations. Some respondents were generally supportive of aspects of the CMA's approach to the draft guidance on administration of the regime.

Extension periods

Summary of responses

- 10.2 Two respondents commented on the extension periods section of the draft guidance. One respondent requested more clarity on what 'special reasons' might justify an extension of the normal time limits under the Act and the other said that the CMA's definition of 'special reasons' is broader than the Act and should be narrowed down and refined. One of these respondents suggested the guidance should apply the same interpretation of 'special reasons' as contained in the CMA's guidance: *Merger: Guidance on the CMA's jurisdiction and procedure* ('CMA2').²³

The CMA's views

- 10.3 To clarify, the Act does not define 'special reasons' and the CMA's approach to guidance on this point reflects the Explanatory Notes (as set out in paragraph 9.3). The guidance already provides some examples of what may be considered to be special reasons. As set out in the guidance, the reasons will be dependent on the relevant circumstances of each case.

Procedural Complaints

Summary of responses

- 10.4 One respondent suggested that the role of the Procedural Officer as set out in other CMA guidance should extend to investigations under the Act to provide an avenue for parties to raise procedural issues.

²³ CMA2 interpretation of 'special reasons': 'Special reasons constitute good, case-specific reasons which justify an extension of the normal time limit.'

The CMA's views

- 10.5 The CMA acknowledges the potential benefits of providing clarity in the guidance as to how procedural complaints relating to the exercise of its digital markets functions can be raised by parties and will be considered by the CMA. It has therefore included guidance in Chapter 9 setting out its approach in that regard. The proposed approach broadly mirrors that which exists in relation to procedural disputes within other CMA tools.

Consultation and publication of statements

Summary of responses

- 10.6 Several respondents commented on this section of the draft guidance, in particular, on the CMA's approach to consultation. A few respondents set out that the CMA should provide more detail on the consultation process, such as providing advance notice of the consultation timetable, engagement touchpoints and confirmation that stakeholders will have sufficient time to respond.
- 10.7 Two industry stakeholders welcomed the CMA's commitment to broad consultation and commended the level of engagement with third parties. However, a number of others asked for more clarity on how the CMA will ensure a broad range of stakeholders are consulted, in particular third parties, and advocated for equal and equitable access to consultations for all stakeholders.
- 10.8 Some respondents were concerned with the form of consultation, suggesting consultations should be communicated to stakeholders in more accessible formats such as slide packs, videos and infographics. They also said that stakeholders should be able to use meetings to provide their views.

The CMA's views

- 10.9 In response to the comments made by stakeholders, the CMA has clarified elements of the consultation process in the section below. It is already committed to:
- (a) under paragraph 9.23 of the guidance, providing advance notice of the timetable for consultation, where appropriate;
 - (b) treating any information or evidence (regardless of format) it receives from stakeholders in accordance with its statutory obligations in respect of protecting confidential information (as outlined in paragraphs 5.94 to

5.100 of the guidance). The CMA will also endeavour to seek representations on confidentiality before publication of submissions;

(c) ensuring that its efforts to engage with parties take into account their circumstances, including any limitations they face (such as time and resources); and

(d) using a range of different ways to engage with stakeholders, including allowing for stakeholders to make non-written submissions to consultations (as per paragraph 9.25 of the guidance).

10.10 The CMA has also updated the guidance to include a commitment to publish an administrative timetable at the beginning of its processes (for example, at the beginning of SMS, PCI or breach investigations). These timetables will typically contain information about the consultation process and key engagement points. The timetables will be regularly reviewed and updated as necessary during the investigation.

10.11 In addition, the CMA will engage with a wide range of stakeholders who are affected by or have an interest in its work, whether during or outside consultations. In doing so, the CMA is committed to ensuring its engagement is wide-reaching, fair and inclusive.²⁴

Transparency

Summary of responses

10.12 A number of respondents, including legal respondents, large digital firms, publishing industry respondents and consumer organisations commented on this section of the draft guidance.

10.13 Some stakeholders wanted the CMA to expand more on transparency, in particular a legal respondent commented that the draft guidance gives the CMA very wide discretion in relation to activity that could involve disclosure of parties' confidential information to external stakeholders. This respondent requested that the draft guidance should cross-refer to relevant guidance in *Transparency and disclosure: Statement of the CMA's policy and approach* ('**CMA6**') and state that it applies to the regime. Others requested clarification

²⁴ [Overview of the CMA's provisional approach to implement the new Digital Markets competition regime \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

on the definition of ‘appropriate information,’ ‘key developments’, and procedure.

The CMA’s views

10.14 The CMA confirms that the guidance should be read in conjunction with CMA6 (as per paragraph 1.3). Further, the CMA states in the guidance (at paragraph 5.97) that it will follow established procedures to identify and protect confidential information across all of its tools in line with its statutory duties, and references in the footnote, paragraphs 4.12 to 4.17 of CMA6.

10.15 The CMA commits in the guidance to exercising its functions under the regime as transparently as possible. As such, the CMA will, at a minimum ensure that relevant stakeholders are informed of its activities and decisions; parties are treated fairly and informed of key investigation developments (including through publication of an administrative timetable at the start of processes), and (where appropriate) relevant parties are informed of who the decision-maker(s) will be. The CMA will also publish information on its use of skilled person reports (as set out in paragraph 9.31 of the guidance).

Duty of expedition

Summary of responses

10.16 Several respondents commented on this section of the draft guidance with some of the view that there should be a balance between expedition and due process. They suggested that the draft guidance should explicitly indicate that the duty also applies to the CMA to consider efficiencies in its own processes.

The CMA’s views

10.17 The CMA will treat all stakeholders fairly when exercising its functions. Additionally, the CMA confirms that the duty of expedition also applies to itself and that it will carefully consider any procedural efficiencies on a case-by-case basis, with due regard to parties’ rights.

Exercise and delegation of functions

Summary of responses

10.18 Several respondents commented on this section of the draft guidance, with the majority requesting more information on the operation of the Digital Markets Board Committee (the ‘**Board Committee**’) and its composition.

Some of these respondents set out that the draft guidance should set out how decision-making will be audited or internally reviewed within the CMA. Such respondents highlighted the importance of auditing key decisions to ensure robustness of the regime.

10.19 A number of respondents requested more detail and clarity on stakeholder access to, and engagement with, relevant decision makers.

The CMA's views

10.20 The CMA has provided detail of the operation and composition of the Board Committee in the published Board Committee terms of reference.²⁵ In addition, access to decision-makers is reflected in other sections of the guidance, for example:

- (a) firms subject to an SMS investigation will have the opportunity to make oral representations on the findings set out in the CMA's proposed decision; and/or
- (b) SMS firms and key relevant third parties may be offered the opportunity to make oral representations on the CMA's proposed PCI decision; and/or
- (c) the CMA will offer the firm under investigation the opportunity to make oral representations regarding provisional findings related to the alleged breach of a conduct requirement.

10.21 The CMA has robust internal review and scrutiny process which it intends to apply when exercising its functions under the regime. Furthermore, the CMA is directly accountable to Parliament for all its work, and this is also the case for this regime. The Board Committee is accountable to the CMA Board which is itself accountable to Parliament.

Coordination with relevant regulators

Summary of responses

10.22 Several respondents welcomed plans for the CMA to coordinate with other regulators when seeking to exercise its digital market functions.

10.23 One respondent suggested that regulatory coordination should go beyond the minimum necessary level. In addition, two respondents considered that where

²⁵ [Digital Markets Board Committee terms of reference - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/681111/digital-markets-board-committee-terms-of-reference.pdf)

multiple regulators can exercise competition powers in relation to a digital case, careful deliberation should take place to establish which regulator may be most appropriately placed to do so.

- 10.24 Several respondents said that engagement between regulators should be transparent to third parties. For example, asking for transparency over when the CMA has sought input from other regulators, clarity over what information would be shared by the CMA with them including assurances on confidentiality; and a suggestion that submissions from other regulators are published.
- 10.25 Several respondents raised the topic of international cooperation and coordination including requests that the draft guidance provide more detail on how the CMA will cooperate and coordinate with international regulators and how it will seek international assistance when administering the regime.

The CMA's views

- 10.26 The CMA appreciates that competition and consumer issues in digital markets sit alongside wider issues such as security, privacy, media plurality, and financial stability. As such, the CMA understands the need for regulatory coordination. The Act includes specific requirements that the CMA consults with other regulators when making certain decisions considered relevant to their remits. This includes Ofcom, the ICO, the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England. These are minimum statutory requirements and the CMA will continue, throughout the regime, to engage closely with other regulators as appropriate.²⁶
- 10.27 As mentioned in the guidance, the CMA intends to formalise such relationships through published bilateral Memoranda of Understanding ('MoUs') between the CMA and the relevant regulators. The CMA will take into consideration respondents' comments on the regulatory coordination section of the guidance as it finalises the MoUs.
- 10.28 The CMA has amended the guidance to clarify its approach to international coordination and cooperation. The CMA recognises that the largest digital firms operate globally and as such that a coherent approach to tackling concerns will be needed across international regulators.

²⁶ [Overview of the CMA's provisional approach to implement the new Digital Markets competition regime \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

10.29 The CMA will consider the actions of other regulators in digital markets and will work with domestic and international counterparts to coordinate, sharing learnings, maximising synergies and minimising duplication, where possible and appropriate. For the avoidance of doubt, the CMA will continue to abide by its statutory obligations to protect confidential information throughout its engagement with other regulators.

Power to charge levy

Summary of responses

10.30 Two respondents commented on this section of the draft guidance; one digital firm supported the imposition of levies on SMS firms. The other, a large digital firm, said that the CMA should clarify that SMS firms will be consulted on the levy rules and on any subsequent amendments to these.

The CMA's views

10.31 The CMA has amended the guidance to clarify that it will also consult stakeholders on amendments to and replacement of levy rules. The CMA will make available more information to stakeholders on its process for consulting on the levy rules in due course.

List of respondents

- A company active in the UK market for digital activities
- ACT – The App Association
- Amazon
- An online travel platform
- Anonymous 1
- Anonymous 2
- Anonymous 3
- Antitrust Section of the International Bar Association
- Apple
- Baker McKenzie LLP
- Bauer Media Group
- Berkeley Research Group
- British American Business and The U.S. Chamber of Commerce's U.S. – UK Business Council
- British Institute of International and Comparative Law
- Chamber of Progress
- Checktrade
- Cleary Gottlieb Steen & Hamilton LLP
- Clifford Chance LLP
- Coalition for App Fairness
- Coalition for Open Digital Ecosystems
- Computer & Communications Industry Association
- Consumer Choice Center
- DMG Media
- DuckDuckGo
- Ecosia
- Epic Games
- Eversheds Sutherland LLP
- Federation of Communication Services
- Free Software Foundation Europe
- Freshfields Bruckhaus Deringer LLP
- Frontier Economics
- Gener8
- Global Antitrust Institute
- Google
- Guardian News & Media
- Information Commissioner's Office
- Information Technology and Innovation Foundation
- International Center for Law & Economics
- Joint Working Party of the UK Bars and Law Societies on Competition Law

- Kelkoo Group
- Law Society of Scotland
- Legatum Institute
- Linklaters LLP
- Macfarlanes LLP
- Match Group
- Meta
- Microsoft
- Miroslava Marinova
- Mozilla
- National Union of Journalists
- Newsbrands Scotland
- News Media Association
- News UK
- Online Dating and Discovery Association
- Online Travel UK
- Open Markets Institute, Foxglove and Article 19
- Oxera
- Public Interest News Foundation
- Preiskel & Co LLP (on behalf of Movement for an Open Web)
- Professional Publishers Association
- Proton
- Payment Systems Regulator
- Publishers Association
- Qualcomm Technologies International
- RBB Economics
- Roku
- Santander
- Sky
- Skyscanner
- Software & Information Industry Association
- Spotify
- TechFreedom
- TechUK
- The City of London Law Society
- TikTok
- Trainline
- Vivaldi Technologies AS
- Vodafone
- Weil Gotshal & Manges LLP
- Which?
- Yelp