# SMS Mergers Reporting Summary of Responses

Summary of Responses to the consultation

19 December 2024



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# **SMS Merger reporting**

### Overview

Just under a fifth of respondents to the digital markets competition regime consultation commented on the draft guidance on the mergers reporting requirement for SMS firms (SMS Mergers guidance). Respondents were a mix of large digital firms, legal advisors and other interested organisations such as trade associations. Comments ranged from high-level support for the CMA's approach to specific points on the drafting of the guidance.

## Reportable events

### UK nexus

### Summary of responses

- 2. Four respondents provided comments relating to UK nexus. In particular, there were some concerns that the guidance was relatively limited or that it relied on the Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2) guidance for what constitutes 'carrying out activities in the UK', which was not out for consultation when the SMS Merger guidance was launched.<sup>1</sup>
  - a. One of these respondents commented that because the SMS reporting requirement is mandatory and could result in penalties for non-compliance, the CMA should set out bright-line tests for establishing when a business might be considered to be 'carrying on activities in the UK' and that any catch-all provisions such as 'any other factors' are inappropriate in this context.
  - b. Another provided a suggestion for stating internal documents as a source of evidence relevant to an intention to supply goods or services in the UK (paragraph 3.12) and commented that more detail should be provided in relation to indirect supply (paragraph 3.16).

<sup>&</sup>lt;sup>1</sup> CMA2 consultation was launched on 1 August 2024 and closed on 12 September 2024.

### The CMA's views

- 3. The CMA will consider and take into account the comments raised above relating to UK nexus and the information included on this in CMA2 as part of the current updates being made to CMA2.
- 4. The CMA notes that the legislation has not established bright line rules for assessing UK nexus. In particular, at this stage where no decisional practice has been established, the CMA considers that it should not introduce through guidance bright line tests that do not exist in the legislation.
- 5. In relation to the drafting points raised by one respondent, the CMA has updated paragraph 3.12 to explicitly mention internal documents but considers that any additional detail on 'indirect supply' should be included in the CMA2 guidance rather than in the SMS Mergers guidance given the concept of indirect supply is relevant across all mergers.

### Value of the consideration

# Summary of responses

6. One legal firm commented that the guidance should make clear the consideration is only cumulative once per relevant shareholding threshold ie if an SMS firm acquires and reports a 15% shareholding, in considering whether the acquisition to 25% is a reportable event, only the incremental consideration is valued.

### The CMA's views

7. The CMA considers that this reading of the legislation is incorrect, as the Digital Markets, Competition and Consumer Act (**DMCCA**) makes clear<sup>2</sup> that consideration is cumulative, and the value of any previous consideration provided by an SMS Acquirer in relation to any shares or voting rights already held in a target should be included for the purpose of calculating the value of consideration for a reportable event. No change to the SMS Mergers guidance has therefore been made.

<sup>&</sup>lt;sup>2</sup> See clause 59(1) of the DMCCA, which states the value of consideration includes all consideration provided by the SMS Acquirer, whether directly or indirectly, for share or voting rights in all transactions which result in it holding shares or voting rights, whether or not the transaction is a reportable event.

### When to submit a report

# Summary of responses

- 8. Three respondents made suggestions around pre-report engagement. These included minor amendments to the language in paragraph 4.5 and footnote 36, allowing SMS firms to submit draft reports where the firm considers the transactions may warrant additional time for review, and encouraging increased flexibility including allowing SMS firms to submit reports earlier in the deal timeline (ie when there is a good faith intention to proceed).
- 9. Two respondents suggested the CMA includes additional guidance on what 'material extent' means in the context of SMS firms not having to report an event if it does not differ to one already reported or notified.
- 10. One legal firm noted it would be duplicative to file a briefing paper with the CMA merger intelligence committee and a report at the same time, and questioned whether the CMA would continue to accept briefing papers in relation to reportable mergers and if so, at what point in time.
- 11. Two respondents commented that additional guidance on the meaning of 'unconditionally obliged' should be included based on the Explanatory Notes and Bill commentary.

# The CMA's views

- 12. As the SMS Mergers guidance makes clear at paragraph 4.1 and 4.2, the timing of when to submit a report is for SMS Acquirers to assess and has a degree of flexibility. If desired, a report can be submitted as soon as a transaction is sufficiently advanced and likely to proceed eg once there is a good faith intention to proceed. Alternatively, SMS Acquirers could choose to submit a report shortly before a reportable event takes place. Finally, where SMS Acquirers consider a deal may require additional time and review, they could choose to instead formally notify the CMA of a transaction rather than reporting it.
- 13. The CMA has included some further text on 'material extent' and 'unconditionally obliged' in the SMS Mergers guidance in response to the consultation responses. In response to a comment on the drafting of paragraph 4.5 of the SMS Mergers guidance, the CMA considers that the use of 'may' is intended to cover it not being obligatory for SMS firms to engage with the CMA on a transaction prior to reporting, but that the CMA will be open to any such early engagement (subject to the transaction being sufficiently advanced as per paragraph 4.2).

14. As explained in paragraph 12 above, there is some flexibility around the timing of a report, and a report could be submitted earlier in a deal timeline as compared to when a briefing note would generally be considered by the CMA's mergers intelligence function.<sup>3</sup> Where a report has been submitted, the CMA would not expect a briefing note to also be submitted (either at the same time, or at a later stage). Furthermore, a briefing paper cannot replace a report, nor would the CMA be in a position to provide guidance on how it would assess a report through its mergers intelligence function, so the CMA would not expect SMS firms to submit briefing papers ahead of a report. However as noted at paragraph 5.4 of the SMS Mergers guidance, SMS Acquirers are welcome to submit additional information alongside their report.

# Reporting requirement process

Summary of responses

# Content of a report

- 15. A number of large digital firms commented that the CMA should provide further guidance on the level of information required in order for an SMS firm to comply. These responses suggested various potential additions such as providing illustrative examples of the information needed, including explanatory notes in the Notice similar to the Merger Notice template, including an indicative page limit for a report. One respondent questioned what 'sufficient' means in the context of reporting and compared to level of information required by the CMA to start an investigation.
- 16. Two respondents suggested the introduction of a simplified reporting process, which could be used for transactions unrelated to digital activities or for transactions where a report has already been submitted for the relevant target.

# Outcomes of reporting process

17. Two respondents encouraged the CMA to be clearer about the proposed outcomes from the reporting process as described in paragraph 5.13, with one commenting that the CMA should commit to a clear steer on its intended next steps following the Waiting Period, and another that the guidance should

<sup>&</sup>lt;sup>3</sup> As set out in the Guidance on the CMA's mergers intelligence function (CMA56), the mergers intelligence function will generally only consider a briefing note after there is a signed merger agreement or other such evidence of a binding intention to merge, and not when there is merely a good faith intention to proceed (paragraph 3.3 and footnote 7).

contain internal deadlines the CMA would adhere to in terms of confirming whether it would investigate or not.

# Initial Enforcement Orders (IEOs)

18. Two respondents commented on the use of IEOs during the reporting process and stated the CMA should reflect in the guidance that the risk of pre-emptive action is low in anticipated mergers.

## Role of third parties

- 19. Three respondents commented on deal confidentiality, asking that the CMA make clear in its guidance that it will not disclose a non-public transaction.
- 20. One of these also suggested that the CMA make clear what gateways and safeguards the CMA would use when sharing information with other regulators. A further respondent commented on the use of the word 'sectoral' in paragraph 5.24 of the guidance when referring to the CMA consulting with other regulators when there are whole economy regulators who may be relevant.
- 21. Finally, one legal firm commented that the guidance should explain whether and how the CMA will gather information from the target business to a transaction as part of the reporting process.

### The CMA's views

- 22. Content of a report: The CMA has included additional guidance on the length and level of detail of a report in the guidance and the notice following the consultation responses. The CMA does not consider the introduction of a simplified reporting process to be appropriate at this time, but has clarified in its guidance that the length of a report may vary depending on factors such as the complexity of the products and links between the SMS Acquirers and the target business.
- 23. Outcomes of reporting process: The CMA has included more guidance on outcomes of the reporting process and in particular some examples of when the CMA may be continuing to assess whether to open an investigation and the next steps it could be taking. The CMA does not propose including internal deadlines in the guidance at this stage, but considers that further detail on timing may be able to be included in future guidance following a review of the reporting process.

- 24. IEOs: The CMA does not propose making changes to the SMS Mergers guidance as it considers the current text is clear that the CMA would only issue an IEO where it is not satisfied that the risk of pre-emptive action is low, and that its approach to IEOs in the context of SMS Merger reporting mirrors its general approach (as set out in the CMA108 guidance), where the risk of pre-emptive action in an anticipated merger is considered lower than in a completed merger.
- 25. Role of third parties: The CMA has updated the text in this section to reflect the comments received, including, that it would not disclose confidential transactions to third parties during reporting unless there were exceptional circumstances, to amend the use of 'sectoral' when referring to regulators and to clarify that it expects to sometimes send questions to the target business involved in a reportable event. The CMA does not consider further guidance on the gateways and restrictions around the sharing of information is required in the SMS Mergers guidance given the CMA's approach is set out in detail in other guidance (Transparency and disclosure: Statement of the CMA's policy and approach, CMA6).
- 26. The CMA notes that where a transaction is not public, more limited information will be available to the CMA regarding the transaction, and in particular reactions of stakeholders to the transaction. As with the CMA's mergers intelligence process, this creates a heightened risk that additional information will come to the CMA's attention after it sends a "no further questions" message that could result in the CMA opening a review.

### Other

### Summary of responses

- 27. There were a number of other comments received relating to the reporting process:
  - a. One large digital firm stated that the guidance should set out the circumstances where the CMA may be prepared to give its consent for a merger to complete during the Waiting Period (as mentioned in paragraph 5.12 of the guidance) and also those where this may be revoked, in order to provide comfort to SMS firms.
  - b. One legal firm suggested that the language around the completion of a transaction is amended in paragraphs 1.3, 5.12 and 5.17 as the DMCCA treats reportable events has having taken place when an acquirer becomes unconditionally obliged to acquire the shares/voting rights, which means the standstill obligation applies before completion.

### The CMA's views

- 28. The CMA has included additional guidance around the provision and revocation of consent for a reportable event to take place at footnote 48 of the SMS Mergers guidance.
- 29. The CMA considers the guidance is sufficiently clear that the standstill obligation requires SMS Acquirers to report prior to the event taking place ie before becoming unconditionally obliged, as set out in the SMS Mergers guidance at paragraph 4.1.

# Reporting Notice

### Summary of responses

- 30. One large digital firm commented that the purpose of reporting is to notify the CMA of the existence and basic facts of a transaction before it completes and that the Notice goes beyond that, and that questions 6, 8-11 should be removed or it should explicitly state that answers can be brief.
- 31. A number of large digital firms commented that the notice should make clear that certain information (such as pipeline plans of a target, especially in a minority interest situation) may not be available to the SMS firm, and that this should not mean that a report is insufficient.
- 32. One legal firm noted that question 5 currently asked about notification to other authorities, but not about plans to notify to the CMA itself.

# The CMA's views

- 33. The CMA considers that all of the questions in the notice are required in order for it to obtain sufficient information for the purpose of reporting. As set out in the Explanatory Notes, the purpose of the reporting requirement is to give the CMA sufficient information and time to decide, before a reportable event takes place, whether to open an investigation and whether to impose an IEO.<sup>4</sup>
- 34. The CMA has amended the notice to acknowledge that certain information may not be available to SMS Acquirers, but also make clear that SMS Acquirers should use best efforts to obtain all of the information requested in the notice, and to explain why they have not been able to where necessary. Question 5 has also been amended

<sup>&</sup>lt;sup>4</sup> Explanatory Note 312 to the DMCC Act.