



12 July 2024

Reply of Bauer Media Group to the CMA's consultation on its draft guidance document under the Digital Markets, Competition and Consumers Act 2024

Introduction

Bauer Media Group ("Bauer") is a leading commercial radio broadcaster and magazine publisher. We welcome the opportunity to reply to the CMA's consultation launched on 24 May 2024 relating to its proposed guidance document, which sets out how it will exercise its new powers under the Digital Markets, Competition and Consumers ("DMCC") Act. Bauer welcomes the DMCC Act and wishes the CMA well in its mission to promote competition in the tech sector.

We believe that the overall approach taken by the CMA in the guidance document works well. It explains how the CMA intends to conduct its various investigations and powers so that interested parties know what to expect, but without addressing issues of substance that can only be decided after a full investigation. In this response, we will pick out some key points that we would like to highlight.

SMS designation

We agree with paragraphs 2.13-2.15 of the guidance document, which explains that the CMA will group activities together into a single designation. This would be efficient because it will avoid sequential designation investigations with overlapping remits. More importantly, it will avoid leaving gaps between designations into which harmful activities could fall.

In a similar vein, we suggest that the CMA states that it will normally define the designated activities relatively widely so that its designations are future-proofed. This would leave room for conduct requirements to address the issues that the CMA wishes them to address, without facing appeal grounds that portray them as straying outside the strict boundaries of the designation. We would be concerned if [X]. We would also encourage the CMA to [X]. In this way, the CMA's designations would align naturally with the way in which the SMS firms offer their products to users. They will benefit [X] industries by enabling the CMA to improve competition [X].



We agree with the CMA's proposal in paragraph 2.43 not to rely on formal market definitions, and the proposal in paragraph 2.45 not to rely on competition law case law. We believe the CMA's work will be more efficient and more sophisticated if it analyses the way in which different products interact with each other in the relevant ecosystems without drawing rigid boundaries between products. Such artificial boundaries would misrepresent the reality of tech markets and make the CMA's assessments more difficult without any clear benefits from doing so.

Forward-looking assessments

We agree with the CMA's description in paragraphs 2.46-2.52 of the five-year forward-looking assessments that it is required to carry out under the DMCC Act. Its assessments can only be based on the evidence that is available at the time of the assessment, and the inherent uncertainty of the exercise does not mean designations should be overly difficult to make. There is a safety valve built into the regime whereby the CMA can de-designate a firm (or just remove some conduct requirements) if circumstances change, so we would encourage the CMA not to feel hindered by the inherent uncertainty of its forward-looking assessments.

Strategic significance

The discussion of strategic significance in paragraph 2.62 seems to miss a key issue, which is the SMS firm's ability to disintermediate (or just block) other firms. For example, [X]. [X]. This ability to control what end users are shown, and therefore the extent to which firms who rely on the SMS firm's products to reach their users are able to thrive, is a key issue in assessing strategic significance.

Consumer benefits

We suggest that the description in paragraphs 3.10 and 3.23 of consumer benefits, which the CMA will take into account when imposing conduct requirements, is incomplete. Consumers benefit not only from lower prices and higher quality goods and services, but also from trusted sources of news, diversity of media, UK-based music and journalism, UK-regulated entertainment, and other cultural aspects. We request that the CMA expands the description in these paragraphs (and elsewhere as appropriate) to show that it will take into account a more holistic view of what consumers want and need.



Section 20(3)(c) of the DMCC Act

As the CMA knows (and as described in detail in its market study reports), the SMS firms derive some of their market power from their ability to build moats around their products and link their products together in wide-ranging ecosystems. The leveraging principle in section 20(3)(c) of the DMCC Act seeks to address that issue, and paragraphs 3.13-3.15 of the guidance document describe how the CMA will implement it.

We encourage the CMA to interpret this provision widely so as to prevent conduct in non-SMS activities from undermining the objectives of the regime. In our view, most forms of conduct that harm competition in an SMS-adjacent activity will in fact strengthen the market power in the SMS activity, unless the non-SMS activity is operated at arm's length from the SMS activity. We would welcome wording in the guidance that discusses the importance of these linkages between SMS and non-SMS activities.

Conduct requirements and pro-competitive interventions

We would welcome further clarification about the situations in which these two tools will be used, where they overlap, and where they do not. The guidance appears to suggest that pro-competitive interventions will be more appropriate for the more intrusive remedies, but we do not believe there is a basis for this in the DMCC Act because the list of possible interventions through conduct requirements is arguably just as wide as for pro-competitive interventions. In our view, the remedies [X] can be achieved through either conduct requirements or pro-competitive interventions. It may be helpful to state that the principal difference between the two tools is the process rather than the substance of the remedies (assuming that is the CMA's view).

Media Act

The CMA will be aware that the Media Act was also passed by Parliament recently. This is a welcome development [X]. [X]. The CMA's work under the DMCC regime will be vitally important in improving competition [X].



Participation and confidentiality

We welcome the way in which the non-SMS firms are included in the various processes so that they can contribute to the success of the DMCC regime. We ask the CMA to continue to bear this in mind throughout its work, and ensure that non-SMS firms are given the data and evidence they need to fully contribute.

We agree with the discussion in paragraphs 5.85-5.91, 6.15-6.19 and 7.26 that confidentiality will be an important element in the DMCC regime. We encourage the CMA to be highly receptive to requests for anonymity and the protection of information because companies risk commercial consequences when speaking to a regulator about the activities of powerful companies on whom they rely to reach their customers.

Final offer mechanism

We generally support the approach taken to the final offer mechanism process in paragraphs 7.112-7.150. We request that the CMA streamlines the processes wherever a reasonable resolution seems unlikely at the earlier stages. The CMA could also ensure that both sides are incentivised to agree a deal at an early stage of the process by, for example, setting clear parameters for the negotiations and requiring the SMS firm to provide full transparency of data to the content providers.

It might be helpful to provide an explanation of when the CMA is more likely to ask content providers to negotiate collectively under paragraphs 7.133-7.135.
