

Response of Roku to the CMA's consultation on draft guidance under the Digital Markets, Competition and Consumers Act
12 July 2024

Roku welcomes passage of the new Digital Markets, Competition and Consumers (**DMCC**) Act. We are pleased to have the opportunity to share our thoughts on the CMA's consultation on its draft guidance document, which was published on 24 May 2024.

We agree with the approach taken in the guidance document. We believe it clearly sets out the various new processes under the DMCC regime. There is an appropriate level of granularity in its descriptions so that affected firms can know what to expect, but without fettering the CMA's decision-making discretion in substantive cases, or narrowing the breadth of the powers Parliament has deliberately designed to be wide.

We therefore have only a limited number of points to make in our consultation response:

Statutory deadlines: Many of the timelines under the new regime are tight. We therefore encourage the CMA to consult affected parties in the period before the statutory clock starts. This should include not only the potential SMS firms but also other firms that will be significantly affected by the new regime. Of course, the CMA may already be intending to do this, but it is not mentioned in the guidance document.

SMS designations: We agree with the guidance document that the CMA should group together activities under fairly widely-defined designations (paragraphs 2.13 to 2.15). As is well known, many potential SMS firms operate sprawling ecosystems of interconnected products and it will be more efficient and effective for the CMA to investigate, and then designate, them together. It may mean that the CMA's individual designation investigations are more resource-intensive, but it will save time in the longer run. This will help to avoid gaps in the CMA's designations into which conduct could fall, and it will therefore help the CMA to address competitive harms without being limited by legal definitions. We also agree with the proposal not to undertake old-fashioned market definition exercises (paragraph 2.43) and not to ignore the excellent analysis the CMA has recently published in its market study reports (paragraph 2.65).

Leveraging principle: The leveraging principle set out in section 20(3)(c) of the Act and paragraphs 3.13 to 3.15 could be defined too narrowly in practice. This provision will be a vital anti-circumvention measure, and we do not believe that Parliament intended the CMA to define it narrowly. We therefore welcome the statement that conduct in a non-SMS activity may be addressed if it reinforces or embeds the market power in the SMS activity. The guidance could also state that this will normally be the case when the SMS product and the non-SMS product are often sold together or to similar customers. We do not believe that the need to "materially strengthen" the market power should be seen as a significant hurdle. The limiting factor should be whether the CMA can justify a competition requirement on its own merits, rather than whether it falls within the scope of the leveraging principle.

Conduct requirements: We agree with the principles set out in paragraph 3.26 for writing conduct requirements. We believe that the CMA will need to employ a mix of outcome-based and

action-based rules if it is to achieve a level playing field in digital markets. This level of specificity, added to the ability to refine the rules regularly, will provide the CMA with an opportunity to avoid some of the complications currently facing the European Commission in administering the Digital Markets Act. We would encourage the CMA to state in its guidance that it will have a preference for conduct requirements that can be implemented more quickly (all else equal).

Interpretative notes: We believe that the use of interpretative notes (paragraphs 3.53 to 3.58) is a good idea. It will help the CMA to explain its conduct requirements in more detail and ensure that a designated SMS firm complies with the spirit as well as the letter of the rules.

Pro-competitive interventions (PCIs): We welcome the CMA's approach to PCIs. The examples of potential remedies are useful, but we would welcome a statement that all of these remedies would also be available as conduct requirements. The choice of tool is a question of the process and analysis required for a particular issue, rather than a choice of remedy powers. It would be useful to clarify this point to avoid arguments that conduct requirements should not be used for PCI-like remedies. Of course, the drafting of conduct requirements can potentially start in Autumn 2024 alongside the first designation investigations, whereas the first PCI investigations cannot start until mid-2025 at the earliest because they must follow a designation decision. It is therefore important not to limit the remedies available as conduct requirements.

Confidentiality: Confidentiality, and often anonymity, will be important for companies who deal with the CMA. We would therefore welcome some strengthening of the wording on these issues (see e.g. paragraphs 5.85 to 5.91, 6.15 to 6.19 and 7.26). We believe the current wording may dissuade companies from voluntarily providing information to the CMA because their confidentiality may not be guaranteed. We recognise that Part 9 of the Enterprise Act 2002 requires the CMA to conduct a balancing exercise between protecting information and protecting a company's rights of defence, but we believe the guidance could state that an SMS firm would rarely, if ever, need to know a company's identity in order to make its submissions. The guidance could also state that the CMA will defend complainants' identity in court if necessary.

Investigatory powers: Parliament has specifically chosen to give the CMA very wide information gathering powers and they will be essential if the CMA is to achieve its objectives. We therefore agree with the approach in the guidance document that confirms the CMA intends to use these powers, particularly measures such as the performance of remedy testing (paragraphs 5.10 to 5.15).

Countervailing benefits exemption: We agree with the CMA's approach to the countervailing benefits exemption. We believe this exemption should rarely apply in justifying rule breaches, so it is appropriate for paragraph 7.62 to explain that potential SMS firms will have to provide new evidence that the CMA had not already considered when writing the rule in the first place. The guidance document could clarify that potential SMS firms are discouraged from holding back evidence that is available at the earlier stage.